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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 330

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE INTERSTATE COMMERCE COMMISSION,
THE UNITED STATES OF AMERICA,
THE PENNSYLVANIA RAILROAD COMPANY, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED SEPTEMBER 30, 1948

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INDEX

	Original	Print
Record from District Court of the United States for the District of Columbia	1	1
Reporter's transcript of proceedings	1	1
Caption and appearances	1	1
Statement to the Court on behalf of the United States, defendant, by Mr. John F. Baecher	5	2
Opening argument on behalf of the United States, petitioner, by Mr. David O. Mathews	7	3
Opening argument on behalf of the United States, petitioner, by Mr. James C. Moore	42	22
Argument on behalf of the Interstate Commerce Commission, by Mr. Daniel W. Knowlton	70	38
Argument on behalf of the Railroad Intervenors, by Mr. Windsor F. Cousins	96	52
Certificate of reporters	121	66
Petition to enjoin and set aside order of Interstate Commerce Commission	122	66
Appendix I—Order of Commission in Docket No. 29117, July 25, 1947	133	72
Appendix II—Report of Commission in Docket No. 29117, August 3, 1945	134	73
Appendix III—Report of Commission on reconsideration, Docket No. 29117, May 3, 1946	153	87
Appendix IV—Report of Commission on reargument, Docket No. 29117, July 25, 1947	173	101
Answer of Interstate Commerce Commission	193	115
Answer of the United States of America	198	118
Motion of Pennsylvania Railroad Company, *et al.* to intervene as defendants	200	119

	Original	Print
Order granting leave to intervene	205	122
Answer of Interveners	206	123
Application for Three-Judge Court	213	127
Order convening Three-Judge Court	215	128
Opinion of the Court	216	129
Order dismissing complaint	227	134
Petition for appeal	228	135
Order allowing appeal	230	136
Assignment of errors and prayer for reversal	231	136
Citation, [omitted in printing]	233	137
Praecipe *re* contents of record on appeal	238	137
Proof of service of copy of praecipe	240	138
Counter praecipe *re* contents of record on appeal	244	138
Counter praecipe *re* contents of record on appeal	247	140
Proof of service of copy of counter praecipe	249	141
Amended praecipe *re* contents of record on appeal	250	141
Proof of service of copy of amended praecipe	252	142
Order for transmission of original copy of the certified transcript of proceedings before the Interstate Commerce Commission in lieu of a photostat thereof	254	143
Clerk's certificate, [omitted in printing]	256	144
Proceedings before Interstate Commerce Commission in Docket No. 29117		
Complaint	258	144
Appendix A—List of defendants	258	144
	270	151
Reporter's transcript of hearing, July 18 and 19, 1944, at Norfolk, Virginia		
Caption and appearances	1	161
Colloquy between examiner and counsel	1	161
Testimony of John Reed Kilpatrick	6	163
Hays M. Heimbaugh	8	165
James Henry Devereux	57	192
James C. McCready	117	228
Edward A. Dougherty	138	240
Edward J. Head	150	247
Hays M. Heimbaugh (recalled)	155	250
S. J. Burrows	183	265
E. A. Hodkinson	194	272
Edward K. Laux	212	282
E. S. Neilson	241	299
Charles R. Seal	246	303
W. W. Wolford	273	318
Charles F. Theobold	277	320
Hays M. Heimbaugh (recalled)	309	340
Carl W. Dilli	319	346
C. H. Ware	321	348
S. H. Williams	336	356
John W. Gilius	341	358
James Henry Devereux, Jr. (recalled)	345	361
	347	362

	Original	Print
Exhibit No. 1—Correspondence between Railroads serving Norfolk, Va. and the Army with respect to matters involved in the complaint	351	364
Exhibit No. 3—Statement showing the export application via Norfolk, Va., of rates in representative tariffs containing class rates and commodity rates, etc.	382	393
Exhibit No. 4—Statement showing basic absorption of wharfage and handling charges at terminals in the Norfolk, Va., Harbor District as published in tariffs issued by A. C. L. R.R. Co., *et al*	399	406
Exhibit No. 8—Statement of class rates and distances between 106 base points resulting from I. C. C. Docket 15879 Eastern Class Rate Case and the ports of New York, etc.	438	439
Exhibit No. 9—Statement of class rates in effect Dec. 2, 1931, or prior to rates published under I. C. C. Docket 15879, between representative points in Central Freight Ass'n. Territory, etc.	445	453
Exhibit No. 12—Chart showing rules governing the application of export, import, inter-coastal and coastwise rates at the North Atlantic Ports	453	455
Exhibit No. 13—Statement setting forth the regulations of Official Territory Rail Carriers serving the port of Norfolk, Va., covering the service of loading and unloading carload freight	455	460
Exhibit No. 14—Statement setting forth the regulations of the rail carriers serving the port of Baltimore, Md., covering the service of loading and unloading carload freight	458	466
Exhibit No. 15—Same for port of Philadelphia, Pa.-Camden, N. J.	461	473
Exhibit No. 16—Same for port of Wilmington, Delaware	464	480
Exhibit No. 17—Same for port of Chester-Marcus Hook, Pa.	466	484
Exhibit No. 20—Rule governing the loading and unloading of freight by rail carrier as published in the Consolidated Freight Classification No. 16	468	488
Exhibit No. 21—Statements showing industries using privately owned or privately operated facilities, located within the Baltimore, Md., Port Terminal Area, etc.	469	489
Exhibit No. 25—Reproduction of Uniform or Standard form of agreement entered into between Seaboard Ry. and such Terminal Operators as it may elect to authorize etc.	474	493
Exhibit No. 27—Chronological history of the Army Base, Norfolk, Va.	478	502
Exhibit No. 28—Arrangements between the Southern Territory Lines and Public Rail-Water Terminals in the Hampton Roads Area etc.	483	507

	Original	Print
Exhibit No. 33—Agreement between The Imperial Tobacco Co., Ltd. and A. C. L. R.R. Co., Oct. 31, 1931	487	511
Report proposed by Examiner	490	517
Reporter's transcript of oral argument, April 5, 1945	499	527
Caption and appearances	499	527
Argument of Donald B. MacGuineas	501	528
Windsor F. Cousins	518	539
Charles P. Reynolds	541	552
Arthur L. Winn, Jr.	544	554
Donald B. MacGuineas (Rebuttal)	548	557
Reporter's transcript of oral argument, April 3, 1946	554	560
Caption and appearances	554	560
Argument of Donald B. MacGuineas	557	561
Benjamin J. Brooks	570	568
Windsor F. Cousins	579	574
Charles P. Reynolds	599	586
Arthur L. Winn, Jr.	616	596
Donald B. MacGuineas (Rebuttal)	627	602
Benjamin J. Brooks (Rebuttal)	634	606
Reporter's transcript of oral argument, Nov. 6, 1946	639	607
Caption and appearances	639	607
Argument of Donald B. MacGuineas	640	608
Benjamin J. Brooks	653	617
Windsor F. Cousins	662	622
Charles P. Reynolds	683	635
Arthur L. Winn, Jr.	693	640
Donald B. MacGuineas (Rebuttal)	696	642
Benjamin J. Brooks (Rebuttal)	697	643
Donald B. MacGuineas (Rebuttal)	705	648
Statement of points to be relied upon and designation of parts of record to be printed	708	649
Appellees' designation of additional parts of record for printing	710	650
Order noting probable jurisdiction	713	652

1 In the District Court of the United States
For the District of Columbia

Civil Action No. 4729-47

UNITED STATES OF AMERICA, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA, DEFENDANTS

THE PENNSYLVANIA RAILROAD COMPANY,
THE VIRGINIAN RAILWAY COMPANY,
SOUTHERN RAILWAY COMPANY,
ATLANTIC COAST LINE RAILROAD COMPANY,
SEABOARD AIR LINE RAILROAD COMPANY,
NORFOLK SOUTHERN RAILWAY COMPANY,
INTERVENERS.

Reporter's Transcript of Proceedings—Filed September 13, 1948.

Washington, D. C.,
Wednesday, May 5, 1948

This cause came on for hearing at 10 a. m. before the Three-Judge Court:

Hon. BENNETT CHAMP CLARK, Associate Justice of the United States Court of Appeals for the District of Columbia;

Hon. MATTHEW F. MCGUIRE, Associate Justice of the District Court of the United States for the District of Columbia;

2 Hon. ALEXANDER HOLTZOFF, Associate Justice of the District Court of the United States for the District of Columbia.

APPEARANCES:

For the United States, petitioner: Mr. James E. Kilday, Mr. David O. Mathews, Special Assistants to the Attorney General; Mr. Frank F. Vesper, Mr. James C. Moore, Special Attorneys.

For the Interstate Commerce Commission: Mr. Daniel W. Knowlton, Chief Counsel.

For the United States, defendant: Mr. John F. Baecher, Special Assistant to the Attorney General.

For The Pennsylvania Railroad Company: Mr. Windsor F. Cousins, Broad Street Station Building, Philadelphia 4, Pennsylvania; Mr. Hugh B. Cox, Southern Building, Washington 5, D. C.

3 For the Virginian Railway Company: Mr. Martin A. Meyer, Jr., Investment Building, Washington, D. C.

For Southern Railway Company: Mr. Charles Clark; Mr. A. J. Dixon, P. O. Box 1808, Washington, D. C.

For Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, and Norfolk Southern Railway Company: Mr. Charles P. Reynolds, 1110 Shoreham Building, Washington 5, D. C.

4-5 *Proceedings*

Mr. O'Donoghue. If the Court please, I would like to introduce Mr. David O. Mathews and Mr. James Moore of the Department of Justice and move their admission for the purposes of this case. Mr. Mathews is a member of the Bar of the United States Supreme Court and of the Supreme Court of the State of Nebraska.

STATEMENT TO THE COURT ON BEHALF OF THE UNITED STATES, DEFENDANT

Mr. Baecher. If the Court please, my name is Baecher. I am the First Assistant in the Antitrust Division.

At the direction of the Attorney General, I wish to say a brief word with respect to the role of the United States as a defendant in this case. By law, as the Court knows, any suit to set aside an order of the Interstate Commerce Commission must be maintained against the United States; but the Commission has a statutory right to defend its orders, irrespective of what the United States may do. And because of the fact that the United States is also prosecuting this appeal on behalf of the War Department, it has filed an answer which in effect withdraws its participation as a defendant, leaving that function to the capable hands of Mr. Knowlton, Chief Counsel of the Interstate Commerce Commission.

6 Justice Clark. What is the idea of counsel about the time?

Mr. Mathews. If the Court please, we have attempted to make some estimates and we feel we can cover our argument in approximately two hours, and possibly less, depending upon the discussion which may ensue.

Mr. Knowlton. I think I will want a little short of an hour—and Mr. Cousins of the Pennsylvania.

Mr. Cox. I might at this time introduce Mr. Cousins to the Court. Mr. Cousins is a member of the Bar of the State of Pennsylvania and is also a member of the Bar of the Supreme Court of the United States. I should like to move his admission for the purposes of this case; and, with the Court's permission, he will make the argument for the intervening railroads in the case.

I think Mr. Cousins would like about an hour, and perhaps a little less, if that is agreeable to the Court.

Justice Clark. The Court is not disposed to cut down the time for a full argument, but we would like to have these arguments shortened, if it can be done for the proper presentation. That is to say, it will run very late this afternoon if everybody takes the full time suggested. So you may proceed, and we will give you all the time you need; but if the argument can be abbreviated, we would like to have it done.

You may proceed.

Opening Argument on Behalf of the United States, Petitioner

Mr. Mathews. If the Court please, we have prepared and the Secretary of the Interstate Commerce Commission has certified as a true and correct copy the entire record made in the proceeding before the Interstate Commerce Commission entitled "United States of America, Complainant, versus Aberdeen & Rockfish Railroad Company and others, Docket No. 29117," and we offer in evidence this record.

Mr. Cox. No objection.

Mr. Mathews. This case involves the railroads' export rates from interior points in the United States to Norfolk, Virginia. Export rates apply exclusively to export traffic, and they never apply to domestic traffic, that is, to traffic which is not to be transported beyond the ports.

Export traffic must be interchanged with water carriers. This requires that the traffic be removed from railroad cars and placed at some point adjacent to ships, within the reach of the ships' tackle. Thus, to complete this interchange, piers or some other means must be available in order to accomplish the interchange. Usually, railroad cars are moved to points on piers adjacent to ships, and the traffic is removed from the railroad cars by hand and loaded on the piers. From these points the traffic is lifted by the ship's tackle and deposited in the hold of the ship.

For more than fifty years the railroads serving the port of Norfolk, Virginia, have provided as a part of the service

included in their export rates the piers needed to accomplish this interchange of traffic between railroad cars and ships. This function is commonly known as wharfage; and, in addition, the railroads have provided the labor needed to accomplish the unloading service.

Among other piers at Norfolk, Virginia, were those known as Army Base Piers 1 and 2. These facilities were constructed by the Government, during the First World War and, after the conclusion of hostilities, these piers were leased to the City of Norfolk.

Subsequently, the piers were leased by the Government to the Transport Trading and Terminal Corporation, also a private concern. The Transport Trading and Terminal Corporation continued in possession of the piers until on or about June 15, 1942.

Each of these lessees or pier operators employed people to unload traffic from railroad cars, and for other purposes. These lessees or pier operators made charges for the use of the piers and for the handling services provided in unloading traffic to the floor of the piers.

For many years these pier operators charged one cent per hundred pounds for use of the piers, and three cents per hundred pounds for unloading traffic from railroad cars, making a total expense of four cents per hundred pounds involved in interchanging traffic from railroad cars to ships.

The railroads made arrangements with the operators of Army Base Piers 1 and 2 pursuant to which the pier operators permitted the railroads to bring cars upon the piers, and the pier operators performed the service of unloading traffic from the railroad cars to the floor of the piers so that it might be transferred to the ships. And, as I have indicated, the railroads paid the pier operators four cents per hundred pounds for this service.

The railroad tariffs, which are the scheduled rates, containing not only the scheduled rates but also the terms and conditions under which transportation shall be performed, which are filed with the Interstate Commerce Commission and which are published at various places on the lines of the rail carriers, specifically provided, during the entire period covered by this complaint, that the carriers would absorb from these export rates the cost of wharfage, that is, for use of the piers and the handling service involved in transferring the traffic from railroad cars to ships.

In other words, under these export tariffs, upon payment of the export rates to the port, a shipper purchased

transportation service, including the line haul from the interior points to Norfolk, and in addition the use of the piers and the handling service involved in unloading the traffic.

There was nothing new or novel in this arrangement. For more than fifty years it has been the general practice of railroads serving North Atlantic ports to absorb this expense from their export rates paid to them by shippers of export traffic. During this period of time, the facilities and services so provided were available to all shippers, including the Government.

In other words, for more than fifty years it has been the general practice of all railroads serving the North Atlantic ports to provide wharfage in the handling and servicing of the export traffic, as part of the service provided by them in return for payment by shippers of the export rates.

With the rapid increase of its traffic during 1942, traffic which was to support military and naval forces overseas, the Government became the principal shipper over Army Base Piers 1 and 2, and, as a result, on or about June 15, 1942, the Government cancelled the lease, due to war conditions, and took control of the piers, in order to expedite the movement of freight and for security and other reasons.

However, the Government retained the entire organization of the preceding pier operator, the preceding lessee, the Transport Trading and Terminal Corporation, and the services continued to be performed in exactly the same way as they had been performed by the Transport Trading and Terminal Corporation.

Notwithstanding this change in control, the railroads made or continued provisions for their published export rates to continue to apply to traffic which was interchanged with ships over Army Base Piers 1 and 2, and commercial traffic continued to move over Army Base Piers 1 and 2, to the extent that military requirements would permit.

In view of the fact that Army Base Piers 1 and 2 and the loading and unloading services thus provided by the Government had been regarded and included for more than twenty years as transportation facilities and services included in the carriers' export rates in traffic moving over the piers, the Government, through its War Department, requested the railroads to make it an allowance, as a shipper, for the expense incurred in providing the piers and handling service on traffic moving over those piers.

12 This request was predicated upon the well established proposition that where a shipper provides transportation facilities and services included in the common-carrier obligation, he is entitled to receive a just and reasonable allowance from the carriers for the facilities and services so provided.

Although the record shows that this expense exceeded four cents per hundred pounds, after control of the piers was taken over by the Government, the Government sought from the railroads only an allowance equal to that which they had been paying to the Transport Trading and Terminal Corporation for the use of the piers and for the services.

The railroads refused to make any allowance whatever to the Government. Although other reasons were assigned after litigation before the Commission was commenced, the railroads initially assigned for the reason—and I quote:

> "Where the control or operation of piers or other facilities is taken over by the Government for its own use or they are operated under contract with the Government and under Government supervision, such facilities or piers should be treated the same as piers operated or controlled by the owners of the property transported and loading and unloading should not be
13 performed by the carriers, nor any allowance made in lieu thereof."

Thereafter, and after the railroad position had been made clear, the Government requested the railroads to perform the handling services over Army Base Piers 1 and 2 to the extent that the handling services were included in the export rates paid by the Government on its export traffic.

In other words, many if not most of these tariffs continued to provide that the expense would be absorbed by the railroads. So that the Government, as an alternative, suggested that the railroads come on the piers and perform the handling service. This request was refused on the same ground, on the issue of control.

And again on November 9, 1943, the Government renewed its demand that the railroads provide wharfage and handling services, but the railroads again refused to comply with this request.

As late as May 3, 1946, some of the tariffs covering export traffic moving over Army Base Piers 1 and 2 provided that the cost of wharfage and handling services involved in interchanging such traffic from the cars to the ships

would be absorbed by the railroads. The railroads continued to provide the piers and perform the handling services at all other points in the Norfolk port district, or to make an allowance for wharfage and the handling
14 services.

In other words, the railroads continued to exact from the Government the same rates for less service on traffic moving over Army Base Piers 1 and 2, that they had charged private or commercial shippers whose traffic moved over those piers prior to June 15, 1942; and they continued to charge the Government, on its export traffic moving over those piers, the same rates for less service, notwithstanding the fact that they contemporaneously provided wharfage and handling service for shippers at other points in the Norfolk port district.

On April 15, 1944, the Government filed with the Commission, the Interstate Commerce Commision, a complaint against the railroads, attacking their failure and refusal to make the Government any allowance for the piers and handling services provided by the Government on its export traffic, after June 15, 1942.

After a hearing before an examiner assigned by the Commission, he made a report proposing that the Government's complaint be dismissed. Subsequently, on August 3, 1945, Division Two of the Commission, consisting of three members of the Commission, reversed the examiner and held for the Government, and ordered that reparation be paid.

Thereafter on May 3, 1946, the entire Commission reversed Division Two, with Commissioners Aitchi-
15 son, Splawn, Alldredge, and Rogers dissenting.

Subsequently, on July 25, 1947, the entire Commission affirmed its first, by a vote of six to five, with Commissioners Splawn, Johnson, Rogers, Alldredge, and Aitchison dissenting.

It appears from the Commission's report made on July 25, 1947, in support of its order, finally dismissing the Government's complaint, that the railroads are again absorbing from export rates applicable over Army Base Piers 1 and 2 the cost of wharfage and handling services. So that the Commission's decision of July 25, 1947, the last decision, involved only the question whether the Government is entitled to reparation for providing wharfage and handling service on this traffic that moved over the piers from June 15, 1942, until on or about July 25, 1947. I do not know the precise date that the railroads again absorbed this expense.

Thus the Government's complaint was dismissed, and it has received no compensation from the railroads for wharfage and handling services since June 15, 1942, except for certain sums paid by one railroad aggregating approximately $865,000 during the course of litigation before the Commission.

This case has been brought under the Urgent Deficiencies Act of October 22, 1913, to set aside and enjoin the
16 Commission's order made on July 25, 1947, and to have the proceeding remanded to the Commission for further action not inconsistent with this Court's opinion.

The Commission has set up in defense of this case that this Court lacks jurisdiction to hear and determine this controversy; and the railroads affected by the Commission's order have intervened and have pleaded a similar defense. In addition, both the Commission and the railroads are defending the order of dismissal on its merits.

The jurisdictional statute upon which this case is brought provides plainly—and I quote:

"The district courts shall have original jurisdiction

* * *

"Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

The Government believes that the question of jurisdiction thus presented by the pleadings is controlled by the Supreme Court's decision in El Dorado Oil Works versus United States, 328 U. S. 12, decided in 1946. There El Dorado had commenced an action in the district court to recover upon its contract with the General American Tank Car Corporation certain payments made by the railroads under their tariffs to the Tank Car Corporation as
17 allowances for the use of tank cars the Tank Car Corporation had leased to El Dorado for a stipulated sum per car per month.

The Tank Car Corporation defended this action, on the ground that for it to make payment in excess of the stipulated rentals, which El Dorado by the agreement in question had undertaken to pay to the Tank Car Corporation for the use of its cars, would be unlawful, because the payments would constitute a rebate and thus would be contrary to the Interstate Commerce Act. The district court sustained this defense; but this decision was reversed by the circuit court of appeals.

On certiorari to the Supreme Court, it held that the district court had jurisdiction to hear and determine the

case, but, before the district court could proceed, that the Interstate Commerce Commission should determine whether payments of the allowances in excess of the stipulated rentals which El Dorado had agreed to pay the General American Tank Car Corporation would be lawful and valid, as required by the primary jurisdiction doctrine.

Undoubtedly the Court is familiar with the well established proposition that determination of the question whether a rate, a rule, a regulation, a practice, or an allowance is a just or reasonable discriminatory or otherwise unlawful one under the Interstate Commerce Act is a matter within the initial and exclusive jurisdiction
18 of the Interstate Commerce Commission. This proposition was initially established in Texas and Pacific Railway Company versus Abilene Cotton Oil Company, 204 U. S. 426, decided in 1907, and it is now firmly imbedded in the law. The proposition is commonly referred to as "the Abilene rule," and as the primary jurisdiction doctrine.

The primary jurisdiction doctrine rests upon the proposition that equality in treatment can only be attained in the determination of the question whether rates, rules, regulations, and practices, and allowances of carriers are reasonable and lawful, if and unless such determination is left to the exclusive say-so of the Interstate Commerce Commission.

Were the courts to attempt to pass upon such questions, the uniformity which the Interstate Commerce Act tends or was adopted to achieve, would not result, for different courts would have different ideas as to whether a certain rate, for example, was just and reasonable; and thus shippers in one part of the country might be paying a rate entirely different from that paid by shippers in another part of the country.

The powers of the courts in relation to questions which have been exclusively committed under the Abilene rule is limited to passing upon questions of law arising from determinations of questions of fact by the Commis-
19 sion, that is, whether there is a rational basis for the Commission's conclusion, whether the findings support its ultimate conclusion, whether the evidence supports the findings, whether there has been any invasion of constitutional rights.

Pursuant to the Supreme Court's decision, El Dorado commenced a proceeding against the railroads before the Commission, seeking a determination by the Commission that the Tank Car Corporation could make the payments

provided for in its contract with El Dorado without violating the Interstate Commerce Act.

After hearing, the Commission found that any payment by the Tank Car Corporation to El Dorado in excess of the monthly rental which El Dorado had agreed to pay the Tank Car Corporation would constitute a rebate and discrimination and involve departure from the railroad's tariff rules applicable to such matters, and the Commission discontinued the proceedings.

Thereafter El Dorado brought suit in the district court under the Urgent Deficiencies Act—the jurisdictional statute here invoked by the Government—challenging the validity of the Commission's findings and its action of discontinuing the proceeding.

The Commission challenged the jurisdiction of the district court to hear and determine the case. The district court dismissed the complaint filed by El Dorado,
20 for lack of jurisdiction. On appeal, the Supreme Court reversed the district court on its determination of the jurisdictional question.

There is no substantial difference between the jurisdictional question presented in this case and the question decided in the El Dorado case. Both the El Dorado case and this case involve past practices, the question of allowances which either were made or should have been made in the past.

The Supreme Court based its decision in the El Dorado case on the proposition that legal consequences would follow the Commission's decision which would finally fix a right or obligation. The same result will follow in this case if the Commission's order is allowed to stand. For this reason the Court concluded, in the El Dorado case, that the Commission's action fell within the class of orders which Rochester Telephone Corporation versus United States, 307 U. S. 125, held to be reversible by a district court of three judges.

Justice Holtzoff. What is the citation of the El Dorado case?

Mr. Mathews. That is 328 U. S. 12.

Justice Holtzoff. Thank you.

Mr. Mathews. Incidentally, your Honor, we will have a
21 brief to submit at the conclusion of the argument which will contain all these citations.

Thus we think that the El Dorado case establishes clearly that this Court has jurisdiction to entertain the controversy.

In the past, three-judge courts have declined to entertain complaints filed to set aside orders of the Commission denying reparations upon various grounds. Examination of these prior decisions discloses that these rulings have been predicated in whole or in part upon one, the negative order doctrine; two, the alternative remedies provided by Section 9 of the Interstate Commerce Act; three, the asserted private character of claims concerning past shipments, as distinguished from the quasi-legislative nature of complaints seeking different rates for the future; and, four, an asserted discretionary power in the Commission to pass upon complaints attacking past rates and practices without observing the statutory standards established by the Interstate Commerce Act.

We believe that all of these grounds either have been expressly repudiated by the Supreme Court, or they have no application under the facts in this case.

As denial of judicial review upon these grounds usually involved two or more of them, it is necessary that the relations of each ground asserted in the past be discussed in connection with the other grounds upon which
22 the courts have relied.

In other words, we contend that the grounds here urged to justify lack of the jurisdiction of this Court either were corollaries of the negative order doctrine and fell with the negative order doctrine in the Rochester case, or they were entwined with the negative order doctrine in such a way as to obscure the proper application.

As I have indicated, the Supreme Court held in the Rochester Telephone Corporation versus United States that the negative order doctrine as theretofore understood would no longer be controlling upon three-judge courts convened under the Urgent Deficiencies Act.

In brief, this doctrine was that an order of the Commission which merely dismissed a complaint, as in this case, and which did not carry with it the duty on the part of some respondent to take affirmative action, was not an order within the meaning of the jurisdictional statute which I have read to the Court.

The negative order doctrine was first announced in Procter & Gamble versus United States, at 225 U. S. 282. There the shipper had attacked certain regulations which required the shipper to pay demurrage—that is, a charge for the delay of cars—to the railroads while cars owned by the shipper were standing loaded on its privately owned track.

The shipper sought reparation for the demurrage collected by the railroads.

The Commission dismissed the complaint, and the shipper brought suit to set aside the order of the Commission denying relief. The court held it had jurisdiction to set aside the order of the Commission and, as a corollary of this power, the court decided it had jurisdiction to award damages for demurrage exacted in the past.

However, the Supreme Court reversed the lower court on the question of jurisdiction. The Supreme Court based its decision upon its conclusion that the jurisdictional statute applied only to affirmative orders of the Commission, that is, that that gave the court the right to entertain complaints only where the Commission's order required the duty of obedience.

In the case of Hooker versus Knapp, 225 U. S. 302, decided the same day as the Procter & Gamble case, the Court explained in greater detail the reason why it had concluded that the jurisdictional statute only embraced affirmative orders. These reasons were that the court was not an appellate court, which received a record from a tribunal below, and that the court had no means of making its mandate effective.

However, the Supreme Court in the Rochester case clearly exposed the fallacy of this view. As Mr. Justice Frankfurter pointed out, Procter & Gamble was authorized under Section 13 of the Interstate Commerce Act to institute
24 the proceeding before the Commission; and since Procter & Gamble asserted a legal right, under the Interstate Commerce Act, to have the Commission apply different principles of law than those which led the Commission to dismiss the complaint, the ingredients for an adjudication, constituting a case or controversy, were present.

Mr. Justice Frankfurter further pointed out that judicial relief would be precisely the same in the Procter & Gamble case as in the recognized instances of review by courts of Commission action. That is, if the legal principles upon which the Commission acted were not erroneous, the complaint would be ordered dismissed. If the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority, on the indicated correct principles.

Mr. Justice Frankfurter also pointed out that the lack of ability on the part of a three-judge court to bring its mandate to bear was not controlling

Under Section 13 of the Interstate Commerce Act, the Commission is required to investigate the matters complained of, to state its conclusions, together with its decision, order, or requirement in the premises. If the order of the Commission is set aside without further relief, it still remains the duty of the Commission to enter an order and make a report consistent with the law.

The lack of substance in the grounds urged by the Supreme Court in the Procter & Gamble and in the Hooker cases is dramatically illustrated by the El Dorado case. There the lack of means on the part of the district court to bring a mandate to bear did not prevent judicial review.

The Commission's order in the El Dorado case was sustained on its merits. But if the Commission's order in that case had been set aside by the court, the Commission would have been required to reopen the proceeding and proceed in accordance with the indicated correct principles, as pointed out by Mr. Justice Frankfurter in the Rochester case.

In fact, the Commission for many years has been doing precisely the same thing, in cases where the courts have entertained jurisdiction. Thus where an order involving rates for the future has been set aside by a three-judge court, the proceeding before the Commission has been reopened and further considered and redecided, either upon the record originally made or upon new evidence, if such seems to be necessary, in order to comply with the court's decision.

In other words, the relationship between the Commission and the courts, in cases where the Commission's orders indisputably are subject to the jurisdiction of the courts, has been in the nature of a relationship between inferior and superior courts.

The Supreme Court's holding in the Procter & Gamble case indicates that theretofore—that was in 1912—except for the negative order policy, the courts have jurisdiction of suits brought to set aside orders of the Commission denying reparations. In any event, it seems clear that the denial of review in the Procter & Gamble case was based solely on the negative order doctrine, and that the grounds now urged were to make their initial appearance later and in connection with cases where the negative order doctrine was held to preclude judicial review.

We believe that the alternative remedies doctrine simply has no application to this case.

Under the Abilene rule the Commission had the initial and exclusive jurisdiction of this controversy, and the courts lacked jurisdiction to entertain the controversy.

The alternative remedies doctrine rests upon what we believe to be an erroneous construction of Section 9 of the Interstate Commerce Act. Section 9 provides, in substance, that any person claiming to be damaged by any common carrier subject to the Act may either make a complaint to the Commission or to any district court or circuit court of the United States of competent jurisdiction; but
27 such person shall not have the right to pursue both of said remedies and must in each case elect which one of the two methods he will adopt.

Obviously, institution of an action before the district court under the Urgent Deficiencies Act—the Act which the Government has here invoked—to review an order of the Commission denying recovery of damages, cannot be construed to constitute the pursuit of the other alternative remedy referred to in Section 9 of the Act, for the remedies invoked in the proceedings before the Commission and the court are entirely different.

The proceeding before the Commission is against the railroads, to recover damages on account of alleged or challenged past practices, whereas the action before the three-judge court is against the United States and not the railroads; and the only remedy available is to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

In other words, an action brought under the Urgent Deficiencies Act is not a trial *de novo*, but it is a special statutory proceeding essentially of an appellate character.

It is well established that three-judge courts convened under the Urgent Deficiencies Act lack the power to determine questions entrusted by Congress to the Commission; but the alternative remedy set forth in Section 9
28 clearly refers to matters within the jurisdiction of both the Commission and the courts.

Section 9 refers to original actions which can be brought before either the Commission or the court, and to seek identical relief. Section 9 has nothing whatever to do with judicial review, but refers to concurrent jurisdictions which were not available to the Government in this case.

It will not be questioned in this case, I am sure, that the proceeding before the Commission here sought to be reviewed involved a matter which, under the primary juris-

diction doctrine, was within the exclusive and initial jurisdiction of the Commission.

In the Abilene case—and that is the case where the primary jurisdiction doctrine was initially established—the Supreme Court held, as a corollary to the primary jurisdiction doctrine, that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violation of the Interstate Commerce Act, conferred by Section 9, is confined to redress of such wrongs as can, consistently with the context of the Act, be redressed by courts without previous action by the Commission.

In other words, after the Abilene case, Section 9 applied only to cases within the jurisdiction of both
29 the courts and the Commission, and Section 9 did not apply to questions such as whether a rate, rule, regulation, or practice was just or reasonable or discriminatory, because that was a matter within the initial and exclusive jurisdiction of the Commission.

Thus it seems clear that Section 9 applies only to cases which require the interpretation of railroad tariffs, as distinguished from cases which require determination of whether a rate or rule or regulation or practice is unlawful under the Interstate Commerce Act.

It may be contended that the interpretation of Section 9 made in the Standard Oil Company versus United States, 283 U. S. 235, is controlling here. However, the Standard Oil case is easily distinguishable from this case. In the Standard Oil case the shipper brought a proceeding against the railroads, before the Commission, to recover certain alleged overcharges.

By "overcharges," I mean charges which either were not provided for in the carrier's tariffs or were contrary to the charges provided for in the carrier's tariffs—a question which normally was within the jurisdiction of both the Commission and the courts.

The Commission dismissed the proceeding, and thereafter the Standard Oil Company brought a suit in the district court against the United States, the Commission,
30 and some fifty railroads, under the provisions of the Urgent Deficiencies Act, seeking an order from the court directing the Commission to grant the prayer of Standard Oil Company's complaint before the Commission, a finding by the court that Standard Oil had been overcharged to the extent alleged, and directing the Commission

to accord a further hearing for the purpose of ascertaining the amount of damages sustained by Standard Oil under the finding sought by Standard Oil from the court.

The Supreme Court held that judicial review was precluded under the negative order doctrine—which was, of course, overruled by the Supreme Court in 1939, in 307 U. S., years later.

In addition the Court held that the case involved a question within the primary jurisdiction or Abilene rule, whether or not there were overcharges, as Standard Oil contended. And the Court further held, assuming the three-judge court had jurisdiction of the case, that no error vitiating the Commission's position had been shown. In other words, in the Standard Oil case the Supreme Court passed on the merits of the controversy, even though it did involve a matter within the Commission's exclusive jurisdiction.

Finally, the Court pointed out that even if the claim only involved overcharges, as claimed by Standard
31 Oil, Section 9 barred maintenance of the action, because Standard Oil sought relief on the merits of its claim, which it had failed to secure from the Commission—a claim within the jurisdiction of a one-judge court, and beyond the jurisdiction of a three-judge court convened under the Urgent Deficiencies Act.

In other words, the Supreme Court held that under the Urgent Deficiencies Act it had no jurisdiction of the claim actually pleaded by Standard Oil, because it initially should have been brought before a one-judge court, and a three-judge court had no right to entertain such an action.

Here we have an entirely different situation. Only the Commission and the United States were made defendants. No damages are sought in this action; and it is impossible to recover damages here, because that is beyond the function of this Court. Whereas in the Standard Oil case the plaintiff joined the railroads and sought to recover damages, the same relief it had failed to secure from the Commission.

Here we seek only judicial relief within the Court's competence, while there the shipper sought relief extending far beyond the relief which three-judge courts are authorized to grant.

Thus it seems clear to us that the Court's discussion regarding Section 9 was dictum, and, in any event, that

32 the discussion stands only for the proposition that the relief sought by Standard Oil was beyond the jurisdiction of a district court as ordinarily constituted, because of an election of remedies under Section 9; and beyond the jurisdiction of a three-judge court, because relief on the merits of Standard Oil's claim could only have been granted by a one-judge court.

Further, it is clear that the entire discussion of Section 9 was based on the assumption that only overcharges were involved. So that to the extent the Standard Oil case is pertinent to the question of judicial review by three-judge courts, it is applicable only to cases involving overcharges, and it has no pertinency to cases presenting questions within the exclusive jurisdiction of the Commission, such as this case.

As it is clear that the Supreme Court's decision respecting Section 9 in the Standard Oil case pertained only to overcharges, cases such as Brady versus Interstate Commerce Commission, 43 Federal (2d) 847, which was affirmed 283 U. S. 804; Baltimore & Ohio R. Co. versus Brady, 61 Federal (2d) 242, reversed at 288 U. S. 448; and Atlantic Lumber Corporation versus Southern Pacific Company, 47 Federal Supplement 511, have no relevancy here, for those cases involved questions within the jurisdiction of both the courts and the Commission.

33 Other cases sometimes cited for the proposition that Section 9 precludes maintenance of actions before three-judge courts and reviewing orders of the Commission denying reparations are George, Allison and Company versus United States, 12 Federal Supplement 862, affirmed 296 U. S. 546, and Ashland Coal & Ice Company versus United States, 61 Federal Supplement 708, affirmed 325 U. S. 840. However, the evidence is compelling that the decisions in those cases rested upon other grounds.

The Supreme Court has never reversed, modified or criticized its decision in the Abilene case, that—

> "The independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violation of the Interstate Commerce Act conferred by Section 9 must be confined to redress of such wrongs as can, consistently with the contest of the Interstate Commerce Act, be redressed by courts without previous action by the Commission."

Both the Allison and the Ashland cases involved matters within the exclusive jurisdiction of the Commission, and

hence Section 9 having no application to such cases, that having been held in the Abilene case, there simply is no support for the proposition that Section 9, under any interpretation of Section 9, could preclude judicial review.

34 In other words, it seems clear that those cases do not rest upon any estoppel against the shipper, for no estoppel can be predicated upon a shipper's action in bringing a proceeding before the Commission as the necessary result of a choice of the alternative remedies provided for in Section 9, where the shipper had no right to bring a proceeding seeking the same relief before the courts and thus had no choice of remedies in fact.

Furthermore, other circumstances support the view that both the Allison and the Ashland cases were decided by the Supreme Court on other grounds. The Allison decision rested upon the negative order doctrine, which was thereafter set aside in the Rochester case, and the district court failed to mention Section 9. It does not appear that any oral argument was made in the Supreme Court, and no opinion was filed.

The Standard Oil case was cited by the Supreme Court in support of its action in the Allison case; but the decision in the Standard Oil case also rested upon the negative order doctrine, which is now thoroughly discredited.

The Ashland case was decided by the district court both upon jurisdictional grounds and upon the merits. On appeal of the Ashland case to the Supreme Court, it does not appear that any oral argument was made to the

35 Court, and no opinion was filed. Instead, the decision was that "The motions to affirm are granted and the judgment is affirmed," which usually denotes that the Supreme Court decided the case on its merits.

Finally, the El Dorado case, the case upon which the Government relies in this action, was decided by the Supreme Court subsequent to all the decisions which I have discussed.

The anomalous result of any holding that Section 9 precludes judicial review of the Commission's orders denying reparations is illustrated by the Supreme Court's opinion in the El Dorado case. There it is shown that a case attacking past practices, attacking the question of allowances made or that should have been made in the past, may be commenced in the district courts; that the action in the district court may be suspended pending determination of those questions by the Commission; that the Commission's

determination may be challenged before a three-judge court such as this one, and thus require the Commission to proceed in accordance with the indicated correct legal principles; and, if ultimately successful before the Commission, the plaintiff may return to the district court before which the case was instituted originally for entry of a judgment for the damages sustained by him.

Yet it has been contended that where the shipper brings such a proceeding before the Commission, and thus avoids these complicated and time-consuming steps, he cannot question an adverse result because of an election of remedies under Section 9—a contention which we believe the Supreme Court's opinion in the El Dorado case demonstrates to be highly technical and without substance.

The elementary injustice of the contention that orders denying recovery of reparations are not subject to judicial review because institution of the proceeding before the Commission constitutes an election of remedies under Section 9 is illustrated by the fact that where orders for reparations are entered by the Commission, judicial review is available to the carriers when the shipper seeks to enforce the reparation order.

In other words, a carrier against whom a reparation order is entered has an appropriate opportunity to challenge the validity of the order. Yet any holding that Section 9 precludes judicial review will result in a situation where an unsuccessful claimant before the Commission is denied similar and equal review.

It has also been contended that judicial review of orders denying reparation should be denied to the courts because of the private, as distinguished from the public character of reparation cases. In other words, the thought is that where the Commission prescribes rates for the future, all shippers are affected by the Commission's order, and that this is not true in reparation cases. But there is no substantial basis for this view, for it is well established that any finding made by the Commission in a reparation case is available to all shippers similarly situated.

A finding as to past shipments inures to the benefit of all shippers who moved traffic at the same rate between points involved in the proceeding before the Commission. Moreover, the Supreme Court's decision in the El Dorado case involved only a controversy of a private character, as dis-

tinguished from a controversy of a public character. But this fact did not preclude the Supreme Court from holding that three-judge courts, such as this Court, have jurisdiction to set aside Commission orders denying relief. On the contrary, the Supreme Court held that such orders have legal consequences which finally fix a right or obligation, and that therefore the order is subject to judicial review.

The contention also has been made that whether the Commission should award reparation is a discretionary power conferred by Congress on the Commission. But there seems to be no substantial basis for this thinking.

Frequently the courts have referred to the fact that the Congress endowed the Commission with administrative discretion in such matters. But the use of such language normally indicates that this discretion may not be exercised arbitrarily or without evidence or contrary to law. The doctrine of administrative finality is used to indicate that an order is subject to judicial review on a narrow range of issues, and not to denote a lack of judicial review.

The standards which Congress has established to control cases involving past rates are substantially identical with the standards which control the prescribing of rates for the future. Based on a review of the standards which apply in the two kinds of cases, there would appear to be no substantial reason to preclude judicial review in one case and to deny it in the other.

Here we have a case where Congress has created a right in a shipper to recover damages from railroads resulting from violation of the Act. Where this right is violated by arbitrary action or by infringement on the law, it would seem elementary that the Commission's determination should be set aside and that the Commission should be required to proceed in accordance with the evidence and the law.

The intervening railroads have raised certain other jurisdictional questions to which I shall refer briefly. They have asserted that the Government may not maintain this action, because it must be brought against the United States.

As we view this question, essentially this case is an appellate proceeding, and we are merely following the prescribed procedure. If private shippers are entitled to judicial review of Commission orders denying reparations under this procedure, then it would seem clear that the Government is entitled to invoke the same procedure.

This action is unlike cases involving financial adjustments between executive branches of the Government, which obviously could be made by the Executive without resort to litigation.

The Government, as a shipper, has a right to just, reasonable and undiscriminatory treatment in the matter of rates, charges and allowances. This right is affected by the Commission's order made in this case, and thus we think this case presents a justiciable case for controversy within the meaning of the Constitution.

In fact, this question appears to have been settled by an opinion rendered in the District of Columbia. I refer to United States versus Public Utilities Commission of the District of Columbia, 151 Federal (2d) 609, 610, certiorari denied 331 U. S. 816. That was in 1947. There the Government secured judicial review of agency action taken by the Public Utilities Commission affecting public utility rates.

The Public Utilities Commission, of course, is a regulatory body of the Government. There appears to be no substantial difference between this case and the public utilities case.

The railroads also have questioned the right of the United States to maintain this action. But this question appears to have been settled in the Public Utilities case.

The Interstate Commerce Act confers on any body politic the right to complain of anything done or omitted to be done by any common carrier subject to the Act. For nearly forty years the Government has brought proceedings before the Commission in accordance with this right. Moreover, unlike some other cases, the Government cannot protect itself by invoking criminal or equitable procedure against the railroads, in the absence of the indispensable administrative determination required under the primary jurisdiction doctrine.

The Urgent Deficiencies Act does not undertake to limit the right to judicial review to any person aggrieved by the Commission's order; but it merely provides, without any limitation, that the district courts shall have jurisdiction to hear and determine cases attacking the Commission's orders.

Furthermore, it is well stated that there is no hard and fast rule excluding the soverign where statutes confer rights on a person. And, finally, until the Rochester case, decided in 1939, the negative order doctrine

precluded judicial review of all orders of the Commission denying reparations, including those issued in proceedings commenced by the Government. So the fact that the Government heretofore has not sought judicial review should not be held to be significant.

If the Court please, on the merits of this matter I have asked Mr. Moore to present the argument, and, with your permission, he will discuss the merits of the complaint.

Justice CLARK. We will take a brief recess at this point, gentlemen.

(Following the recess:)

Justice CLARK. Gentlemen, before we proceed, the suggestion was made by counsel that you file a brief at the end of the hearing. If counsel have briefs to submit, the Court would be very glad to have them, and it would have been well for the Court to have them when we started, as it is then easier to follow. And if briefs are to be filed, it seems it ought to be possible to cut down on the argument to some extent.

You may proceed.

42 OPENING ARGUMENT ON BEHALF OF THE UNITED STATES, PETITIONER (continued)

Mr. MOORE. May it please the Court, in the interest of time, then, I shall refrain from restating any of the facts, except where pertinent to the particular subject to which I wish to call the attention of the Court.

Justice CLARK. That is very desirable, unless there is a dispute as to some matter of fact.

Mr. MOORE. All right, sir. Unless it is absolutely necessary, I will refrain from repeating any of the facts, and we will attempt to cut down the argument as much as possible.

Justice CLARK. You may proceed.

Mr. MOORE. Mr. Mathews pointed out that the Government's complaint filed in this case before the Interstate Commerce Commission sought to recover damages sustained by the Government by reason of the fact that the railroads refused to perform wharfage and handling services on the traffic that moved after June 15, 1942, over these Army Base Piers 1 and 2 at Norfolk, Virginia. He also pointed out the circumstances under which the Commission has seen fit to dismiss the Government's complaint.

The Government contends that this order of dismissal by the Interstate Commerce Commission is vitiated by

errors of law and by misapplication of the statutory
43 standards prescribed by Congress, and that the order lacks the requisite rational basis.

No doubt the Court is familiar with the well established rule that where a shipper provides a transportation facility or performs a handling service that is clearly within the common carrier obligation, the shipper is entitled to a just and reasonable allowance for the provision of the facility or for performing this service. It was under this rule of law that the Government brought its action originally before the Interstate Commerce Commission.

Under that rule, the Government feels it is entitled to an allowance by reason of the fact that, as Mr. Mathews pointed out, the Government itself provided the facilities and performed the wharfage and handling services—or performed the handling service, rather—on this traffic that moved over these piers after the Army saw fit to take them over due to the war emergency.

They requested that such an allowance be made, but the railroads refused; they refused to give the Government the allowance, and hence this action was originally initiated.

Mr. Mathews pointed out, also, the reasons given by the railroads for this refusal. Rather than quote from the railroads' letter of refusal, substantially it is that by
44 reason of the fact that these piers were used to such an extent for the handling of the war traffic, the railroads felt that they were justified in treating the piers as private piers, and as distinguished from public piers.

In other words, they felt that the control that the War Department saw fit to exercise during war time justified them in refusing to perform this wharfage and the handling services, or to make an allowance to the Government in lieu thereof.

The general practice of the railroads had been, prior to June 15, 1942, and was thereafter and is now, to limit the number of piers over which handling services would be provided. But, as I shall attempt to point out later, their reasons therefor should not be applicable in this case; they have no application here.

As stated before, the railroads made their contention that the control as exercised by the Army either had the effect of converting the piers from public piers to private piers, or that under the circumstances they were justified in refusing to provide the piers and perform the handling services.

Justice CLARK. They still charged for them in the tariffs, didn't they?

Mr. MOORE. That is right—and I will come to that later, your Honor.

The Commission saw fit to sustain this contention of the railroads and to dismiss the Government's com-
45 plaint. However, the Government submits that there is no rational basis for this decision on the part of the Commission.

If you examine the reports of the Commission that are set out as appendices to the petition, you will find that the Commission did not make any specific finding; it failed to make findings that the control that was exercised by the Army did in fact convert these piers from public to private piers. Nor in these reports did the Commission make any specific finding that the railroads were justified under the circumstances in treating these piers as private piers, as distinguished from public piers.

It is quite clear, however, from their reports that the Commission's decision regarding the private nature of these piers is predicated upon its conclusion that the Government controlled them and in fact did convert these piers from public piers to private piers, or that the railroads were justified under the circumstances in treating them as private piers.

It is likely that the Commission's failure to make these specific findings that are necessary resulted from the fact that the railroads advanced no substantial reason as to why the Army Base piers 1 and 2 by the Government either had the effect of converting them from public to private piers, or justified the carriers in so treating them.

Both the railroads and the Commission relied heavily upon a prior decision of the Commission in a case
46 entitled Weyerhaeuser Timber Co. versus Pennsylvania Railroad, the citation of which is set out in the brief. The Commission clearly stated the reasons, in the Weyerhaeuser case, for the general policy of the railroads, as I mentioned before, or refusing to load or unload freight over private piers, and those reasons, as stated by the Commission in the report, are these—and I quote from the report:

> "The reasons for this policy are the difficulties of policing the practice, the necessity of performing the handling at the rail carriers' own convenience, the economy resulting from the concentration over a limited number of piers, and the conservation of revenue."

But the Government feels that these reasons, as set out by the Commission, for this general policy on the part of the railroads, fall of their own weight when applied to the circumstances involved in this case.

We would like for you to consider these four reasons for just a moment. The first reason given by the Commission was the difficulty of policing this traffic that moved over the piers. However, to contend successfully that the difficulty of policing the practice provides a rational basis for the railroads' refusal to handle freight over these piers, there must be a corresponding showing that the Government, unless policed, intended to divert this traffic from export to domestic destinations and at the same time
47 to seek the export rates on the traffic thus converted from export to domestic; or that the Government intended to take some action that would be detrimental to the interests of the railroads.

However, the record in this case contains no such showing by the railroads. On the contrary, the railroads accepted payment for the transportation services rendered, based on the export rates, as your Honor suggested. In fact, it is also clear from the record—and the fact was undisputed—that there was at all times during the period here in controversy a joint agent of the railroads who maintained an office and operating crews; that is, an office force, at the piers at all times; and that two or three times this joint agent of the railroads would submit reports to the Government representatives in charge of the operation of the piers, these reports so submitted by this joint agent containing, among other things, information as to whether or not the particular shipments listed on the reports was destined for export.

So the necessity for policing the practice is absent here; and, in fact, the railroads were in a position to police the practice if they had found it necessary to do so.

The Commission failed to make any finding that reasonably could be construed to show either a need for policing the practice, or that the carriers would have been precluded from policing the practice, if they deemed it to be
48 necessary for their protection.

Now, for the second reason, that was the necessity of performing the services at the carriers' own convenience. However, in considering this reason, it is necessary also for the Court to consider the duty that was imposed upon the railroads by Section 6, paragraph 8, of the Interstate

Commerce Act, which requires that in time of war carriers must adopt every means within their control to facilitate and expedite the military traffic.

Here, as in every undertaking during the war emergency, personal convenience becomes secondary to winning the war. And, under the circumstances involved in this case, surely the Commission should have assigned some reason why the necessity of performing the service at the railroads' own convenience was superior to their duty to facilitate and expedite the military traffic. But this the Commission failed to do.

And the Commission made no finding that reasonably could be construed to show that the control of Army Base piers 1 and 2 by the Government would have interfered in any substantial way with handling the traffic at the railroads' own convenience.

The third reason assigned or relied upon by the railroads and the Commission as justification for the railroads' refusal to provide these piers and perform the services, was the economy resulting from the conversation over a limited number of piers.

49

The Government submits, your Honors, that that point clearly has no relevancy here, because there was never any suggestion on the part of the Government that the railroads perform these services at piers other than piers at which they had previously performed the service.

In other words, the railroads had performed the service at Army Base piers 1 and 2 prior to the time the Army took over; but when the Army took over, they ceased to perform the services. And clearly it cannot be contended there was any suggestion that the railroads expand their service.

Justice Holtzoff. Were the railroads in a position to render this service, if the Government had not stepped in and done the work itself?—considering the increased volume of traffic?

Mr. Moore. May it please the Court, we are coming to that point; but to answer the question here—

Justice Holtzoff. I don't want to interrupt your trend of thought in the argument, if you are coming to that question later.

Mr. Moore. All right, sir; with your Honor's indulgence I will hold that answer in abeyance, then.

To repeat, there never was any proposal by the Government that the railroads provide service over the piers not previously utilized by them for this purpose. The facts are.

and the Commission found, and I would like to quote
50 just this one finding from the Commission's report:

"The handling of such a large volume of freight as was concentrated at complainants' Army Base facility would have involved no wide dispersion and is to be presumed as conducive of maximum economy."

Justice McGuire. Isn't it the contention of the railroads that the Government, in taking over the piers and furnishing its own wharfage and handling, and thereby assuming that control over them, that they should be forced to pay?

Mr. Moore. That is the contention of the railroads, your Honor.

Justice McGuire. That is the basic contention in this case?

Mr. Moore. Yes, sir, and by reason of the claim that the taking over of these piers in wartime by the Army, and their proving of the facilities and the services, that the piers were converted from public piers to private piers. That is the contention I am trying to break down.

Justice McGuire. The Army was furnishing its own wharfage and handling its own freight; and therefore, as a consequence, the railroads were not obliged to pay therefor.

Mr. Moore. That is the contention of the railroads.

Justice Clark. But the railroads were still charging the shippers for that service, were they not?

Mr. Moore. That is correct, your Honor.

Justice Clark. They refused to perform the work,
51 and refused to reduce the rates.

Mr. Moore. That is correct, your Honor, and that point will be brought out clearly later on.

The last position relied on by the Commission and the railroads was that it was necessary to eliminate the provision of these services in order to conserve the revenues of the railroads. But, like the third reason just discussed, the Government submits, this standard should have no application in this case, because prior to June 15, 1942, when the Army took over, the railroads had provided the facilities and services with respect to export traffic moving over these piers, and they had also absorbed the charges therefor, collecting only the line-haul rates from the shippers.

The same situation existed at other public piers, not only in the Norfolk port district, but at other North Atlantic ports. Thus, providing the facilities and services at Army Base piers 1 and 2 after June 15, 1942, when the Army

took over, would have resulted merely in a continuation of a practice for the same compensation.

All we were asking was that they continue to perform, and that they charge the same price. The carriers would have been left in precisely the same financial position as they were in with respect to traffic handled over these and other piers prior to June 15, 1942.

Nor can it be contended successfully that to provide facilities and services over Army Base Piers 1 and
52 2 will leave the door open for demands upon the railroads to provide similar facilities and services at purely private piers, because there the standards that were set out by the Commission in the Weyerhaeuser case could be applied to the private situation or the commercial situation; and the commercial or private shipper would be able to meet these standards, that is, they would not be able to show there was no necessity for policing the practice, and for other reasons set out.

Thus, according the facilities and services to the Government's traffic would have offered no threat to the carriers' revenues.

Finally, the record made before the Commission shows that control of Army Base piers by the Government after this date did not convert them from public to private piers. Instead, commercial traffic moved over the piers to the maximum extent compatible with the prompt and expeditious movement of the military traffic.

The Commission made this finding, that—

> "The Army allows the piers to be used for commercial bulk freight when that traffic can be handled without interference with the movement of military freight."

The testimony of record discloses also that approximately 700 carloads of commercial freight moved over these piers between June 15, 1942, when the Army took over, and July 18, 1944, a period of a little over two years.

53 I think that Commissioner Splawn clearly sums up the situation, saying:

> "The defense of the port lines resting, as it does, on the attempt to distinguish complainant's piers as private piers, lacks force."

The arbitrary character of the Commission's conclusion that this control by the Government required them to be treated as private piers is further illustrated by a decision of the Commission in a substantially identical situation. I would like to direct your attention to the case entitled "Elimination of New York, New Haven & Hartford Rail-

road pier stations," found at 255 ICC 305. There the railroad, by tariff amendment, attempted to relieve itself of its stated responsibility for the extent of loading and unloading freight interchanged with water carriers over certain piers at Boston and Providence, Rhode Island, including one pier owned by the Army, and another under lease by the Navy. The reason there given by the railroad for the proposed amendment was that the piers were used to such an extent for military purposes that they no longer could be regarded as public piers open for general commercial traffic.

However, the Commission in that case saw fit to reject the railroad's argument, and there they found that—

> "Respondent treated these piers for many years as some of its principal port facilities at which com-
> 54 mercial shipments were loaded and unloaded, that service being included in the line-haul rates. We are of the opinion that the circumstances upon which it now relies as justification for discontinuance of that service do not warrant the conclusion that the piers in question should at this time be treated as private piers."

Thus the Government submits that the Commission's conclusion that control of Army Base piers 1 and 2 by the Government after June 15, 1942, justified the railroads in treating those piers as private piers is arbitrary and capricious and lacks the rational basis required for its support.

The Commission also concluded, in its report, that it was neither the legal duty of the railroads to provide piers nor to load or unload carload freight. The Government contends that this conclusion is erroneous as a matter of law.

In the early stages of this controversy, before the Government filed its complaint with the Interstate Commerce Commission, the railroads did not suggest or did not contend that they were under no legal obligation to provide these piers or to perform the loading or unloading of the traffic.

In other words, the railroads did not contend that these facilities and services were not included in their common carrier obligation.

If you will consider that proposition for a moment, if it were valid, then the question whether or not con-

55 trol of Army Base piers 1 and 2 by the Government made them private piers were justified the railroads in treating them as private piers would become moot, because the reason is clearly that if there was no legal obligation to provide the piers or to perform the services, then surely the carriers could not have been required to furnish them. Correspondingly, if there was no legal obligation to provide these facilities and services, neither the Government nor any other shipper could recover compensation in the form of an allowance, where the railroads refused to provide the facilities and services.

This would be true even though it were determined that the piers involved were public, as distinguished from private piers.

But after the Government filed its complaint, the railroads asserted, and the Commission sustained them, that—

"It is neither the legal duty of the railroads to provide piers, nor to load or unload carload freight, except in unusual circumstances."

This is what the Commission found.

It is evident from an examination of the Commission's report on re-argument that the Commission's order dismissing the Government's complaint was predicated, in part at least, upon its conclusion that there was a complete absence of any legal duty on the part of the railroads to provide these piers and to perform the services.

It has long been established at common law—and
56 I am sure your Honors are familiar with this point of law—that if a carrier accepts goods for transportation to a point beyond the termination of its own line, then the carrier is under the legal duty to deliver the traffic safely to its connecting line. This duty at common law to deliver safely to its connecting line is not restricted to situations where both lines are rail lines, but it extends also to situations where one line is a rail line and the other line is a water carrier or a water line. And the Supreme Court has clearly held that, and I refer your Honors to one case, Texas & Pacific Railway Company versus Reiss, found in 183 US 621.

In that case the Supreme Court refused to relieve the rail line of its liability as an insurer for loss by fire of goods which had been unloaded by the railroad at its pier, but which had not been delivered to the water carrier.

Thus it seems elementary that if a carrier accepts goods for transportation to a point beyond its line, and that it thereby assumes the legal obligation or the legal duty to

deliver safely the goods to its connecting carrier, this legal duty also includes the duty to provide adequate facilities and services to accomplish this interchange of traffic.

The Commission itself has recognized the soundness of this proposition—and, on this, I refer your Honors to at least two cases that are set out in the brief: The Galveston Commercial Association case, and the lighterage and storage regulations at New York case.

57 The Commission has acknowledged the railroads' duty to provide adequate services at the ports, for the Commission stated, in its report—and I quote:

> "The wharfage and handling at the defendants' public commercial piers are transportation provided by them for the shippers."

In the light of this language by the Commission, it seems clear that if wharfage and handling are "transportation" at public piers, they are transportation included in the common carrier obligation. And, being included in and a necessary part of the common carrier obligation with respect to export traffic, there is no substantial reason why the railroads' legal duty to provide wharfage and handling services at the Army piers should be less or different than their legal duty to provide the line-haul service to those piers, if both are included in the common carrier obligation.

It should be pointed out that the railroads' legal duty to provide wharfage and handling services is not limited to the common law. Instead Section 1, paragraph 4, of the Interstate Commerce Act provides that railroads subject to the Act are under the duty to establish reasonable through routes with common carriers by water, subject to Part 3 of the Act—that is, the interstate common carriers by water.

Section 3, paragraph 4 of the Act provides that railroads subject to the Act shall afford all reasonable, proper and equal facilities for the interchange of traffic between

58 them and their connecting lines, both rail and water.

In other words, the Act imposes the duty upon the railroads to establish through routes with interstate water carriers and to provide facilities for the interchange of traffic between the railroads and these water carriers.

Justice McGUIRE. Do I understand it to be the contention of the Government that previous to 1942, when the Government again took possession of these piers, that the transportation of commercial shipping for export, from rail-

road cars to the ships, was handled by the railroads, and the cost of 4 cents per hundred pounds was absorbed by the railroads?

Mr. Moore. That is correct, your Honor.

Justice McGuire. And was that 4 cents per hundred ponds charge figured in the tariff as originally charged the shipper from some point, wherever it might be in the interior?

Mr. Moore. It was, your Honor.

Justice McGuire. And that after 1942, when the Government took back the piers and the wharves, the railroads refused to handle the shipments, that is, from the car to the ship, but charged the Government the tariff rate, of 4 cents?

Mr. Moore. That is correct, your Honor. That is the contention of the Government.

Justice Holtzoff. If the Government had not stepped in, would the railroads have had enough facilities to do the work themselves, bearing in mind the increased
59 amount of traffic during those years?

Mr. Moore. May it please the Court, the record is not quite clear on that point.

Justice Holtzoff. Isn't that a rather important question of fact, because if the railroads had adequate facilities, that is one thing; and if they could not have done the work because of the pressure of traffic, the situation would have been entirely different?

Mr. Moore. As I was about to say, your Honor, the record is not quite clear as to whether or not under the circumstances the railroads would have been able to provide the services that were necessary. That was not clearly brought out in the record.

Justice McGuire. Then your position, I take it, is if they could not do the work, they should not make the charge?

Mr. Moore. I wish you would repeat that, your Honor.

Justice McGuire. In other words, your position apparently seems to be, reduced to its lowest common denominator, that if they could not do the work, they should not make the charge?

Mr. Moore. That is correct, your Honor.

Justice Clark. In other words, if they couldn't do the work, the charge they put on the shippers would seem to be a rake-off for the railroads?

Mr. Moore. It seems quite clear that in the case of rail-water routes, such as are here involved, the duty in-

60 cludes the obligation to unload freight so as to place it within reach of ship's tackle. This duty also includes the obligation to provide the piers, when they are reasonably necessary, to effectuate the delivery. So we say that the legal duty of the railroads not only rests upon the common law, but also upon the Interstate Commerce Act, and not, as the Commission asserts, upon a tariff undertaking.

In concluding that providing piers and handling services on traffic interchanged with water carriers is not included in the common carrier obligation, the Commission completely disregarded its own findings regarding the railroads' experience in transporting such traffic, because the Commission found that it had been the general practice for over 50 years for the railroads serving the North Atlantic ports, that is, the ports including Norfolk, to load from pier to car and unload from car to pier the water-borne freight which moved by rail to and from those ports.

One specific example referred to by the Commission in its report is the case of the Pennsylvania Railroad. In 1925 that railroad entered into a contract with the Norfolk Tidewater Terminal Company, which was then the lessee and operator of Army Base piers 1 and 2. Under this contract the operator of the piers was to perform the handling services and provide the piers for and on behalf of the Pennsylvania Railroad.

It is significant also to note that the carriers refer
61 specifically in their tariffs to these facilities and services. The fact that such reference is made shows that they are transportation facilities and services without which such traffic never could be moved to its ultimate destination.

When you consider that piers and handling services are indispensible to completion of the through rail-water movement, it is difficult to understand the Commission's conclusion that the providing of piers and the handling services is not included in the obligation of the common carrier where it accepts these goods for transportation beyond the termination points on the line.

There is a further point for the Court to consider in this connection also, and that is that the Commission has consistently criticized the carriers for performing or making allowances for services not included the common carrier obligation. The Commission has condemned these services as being preferential, and has also criticized the carriers

for providing such services, because they result in the dissipation of the carriers' revenue, and because they constitute inefficient, uneconomical operation, not in the public interest.

But the Commission in this case made no suggestion that the railroads discontinue their practice, from which it follows that wharfage and handling services are included in the common carrier obligation.

62 The Government submits that the Commission's conclusion in this respect is clearly erroneous as a matter of law.

Further evidence of the arbitrary and capricious action of the Commission is its conclusion that the provisions in the railroads' tariffs providing that wharfage and handling services at the piers of the Transport Trading and Terminal Corporation would be included in the rates were meaningless after June 15, 1942.

In other words, the Commission found that these provisions in the carriers' tariffs were meaningless after the Army took over, that is, the provisions to provide the piers and perform the services.

I think Mr. Mathews stated that the Transport Trading and Terminal Corporation was the lessee and operator of these piers at the time the Army took over. It is also quite clear from the record that prior to the time the Army took over, several of the railroads' tariffs provided that wharfage and handling at the wharves of the Transport Trading and Terminal Corporation, that is, the same piers, the Army Base piers 1 and 2, would be included in the transportation under the rates to or from the port.

These same provisions were carried in these tariffs for extended periods after June 15, 1942, even though the Army took over these piers on that date and the Transport Trading and Terminal Corporation was no longer the lessee and operator of those piers.

63 The record also discloses that some of the tariff provisions referred to remained unchanged nearly four years after the Army took over the piers. And, to clarify this point, I would like to refer to a specific tariff and the provision contained in that tariff. The tariff of the Virginian Railway provided—and I quote from the tariff:

"At Lincoln Tidewater Terminals, Incorporated, Transport Trading and Terminal Corporation, or Southgate Terminal Corporation (Portsmouth Division Terminals)—

"Wharfage, handling and terminal charges, as published in Norfolk and Portsmouth Belt Line Railroad Tariff No. 6-J, I.C.C. No. 105, will be included in the transportation rates applicable to or from Norfolk, Virginia, on the following traffic moving in connection with the Virginian Railway through the above terminals."

64 In other words, the tariff names specifically the Transport Trading and Terminal Corporation, and it also provided that wharfage, handling and terminal charges would be included in the transportation rates.

It is the Government's contention that the words in the tariffs of the carriers, that is, the words "Transport Trading and Terminal Corporation," adequately designated these piers as piers over which this handling service would be provided. It is the railroads' contention that since the words "Army Base Piers 1 and 2" were not substituted in the tariffs, that the wharfage and handling charges were not included in the rates to Norfolk.

You will recall that in connection with its conclusion that the railroads were under no legal obligation to provide wharfage and handling services, the Commission concluded also that when the railroads obligate themselves to provide such services, the duty is established by tariff undertaking. In other words, when their tariffs provided that wharfage and handling charges would be included in the port rates, the railroads were legally obligated to provide the services or make an allowance therefor.

But in spite of this conclusion, the Commission sustained the railroad's contention that these tariff provisions were inapplicable to traffic moving through Army Base Piers 1 and 2 after the Government assumed control.

65 The Commission concluded that the railroads' obligation under these tariff provisions extended only to going concerns, and when the Transport Trading and Terminal Corporation's lease was cancelled by the Army, this change in management of the piers terminated their obligations under their tariffs.

The fallacy of this conclusion lies in the fact that a corporation may own, lease, or operate wharfage facilities, but certainly it is not a terminal at which or through which traffic can be interchanged. The question is whether the tariffs should be construed in favor of the railroads, as being meaningless and of no force and effect, as is done in the Commission's report, or in favor of the shipper, as

designating by the name "Transport Trading and Terminal Corporation" the Army piers as facilities over which the shipside rates apply and at which the railroads would absorb the wharfage and the handling charges.

For periods ranging up to ten years, commencing in 1925, the railroads provided the use of the piers here involved and performed the handling services, even though the lessee and operator of the piers was not named in the tariffs during those periods.

It is a well established rule of law that tariff provisions are to be construed strictly against the carrier, and any doubt resolved in favor of the shipper.

66 We submit, your Honors, that no such construction has been placed by the Commission on the tariff provisions involved in this case.

In the final analysis, the situation is a simple one and it is simply this, that the Commission sustained the railroads' contention where the Government was the principal shipper, notwithstanding the fact that the railroads themselves have placed a different interpretation on a tariff when the principal shippers were private or commercial shippers.

Earlier in my discussion I considered the Commission's conclusion that the railroads were under no legal or tariff obligation to provide wharfage and handling services.

The Commission further concluded that even if there was a legal obligation, the railroads were relieved of that obligation by reason of the fact that the Government had taken control of these piers on June 15, 1942.

But an examination of these reports I have referred to previously indicates clearly that the Commission treated the war emergency that forced the Government to take over these piers as a legal justification for the railroads' refusal to provide the pier facilities and to perform the handling services.

Justice Holtzoff. Do I correctly understand it to be the Government's contention, in effect, that the rail-

67 roads were getting paid for something they didn't do? They got something for nothing, and you want to be reimbursed, or you want a refund?

Mr. Moore. That is exactly the Government's position, your Honor.

Justice McGuire. What happened to the lessee, the Transport Trading and Terminal Corporation, after the Government took over?

Mr. Moore. As Mr. Mathews pointed out, the lessee's complete organization was absorbed by the Army. In other words, the Army took over the entire working personnel and equipment of this terminal operator, and made it its own. In other words, the same personnel and the same facilities that had originally performed this service continued to perform it after the Army took over.

Justice McGuire. Have the railroads paid the lessee corporation anything while they were holding as lessee, for the use of the piers?

Mr. Moore. They had paid them four cents a hundred pounds for traffic handled by it, your Honor.

Justice McGuire. Do I understand you to say that while the piers were in private operation and operated by the lessee corporation, the railroads took four cents per hundred pounds and paid that amount over to the private corporation for the use of its facilities?

68 Mr. Moore. And for the performance of the handling services—that is correct, your Honor.

Justice McGuire. And when the Government took over, the four cents was included in the shipping rate?

Mr. Moore. That is correct.

Justice McGuire. And the railroads then refused to reimburse the Government for its handling expense?

Mr. Moore. That is correct, your Honor. That is exactly the way it was done.

Justice Clark. What happened when the Government turned it back? The Army turned those piers back in 1944, didn't they?

Mr. Moore. I believe at a later date than that, your Honor.

Justice Clark. Whenever it was.

Mr. Moore. Whenever it was, it is clear from one of the reports that the Army was turning these piers back, and they were being operated in the same manner as they had been prior to the time the Army took them over.

Justice Clark. And the railroads are paying for that service?

Mr. Moore. That is not clear from the record, your Honor, but I assume that is true.

I was just about to come to the point of the Transport Trading and Terminal Corporation.

69 Justice Clark. Well, you had better come to it pretty quickly. You have only five minutes left.

Mr. Moore. Only five minutes, your Honor?

Justice CLARK. Yes—and you will have consumed two hours.

Mr. MOORE. Your Honors, the Government's purpose is to point out as clearly as possible the questions involved and the Government's contention in this case. However, we do believe that our brief covers all of the points involved, and has covered them completely and sufficiently. So with your permission, I will discontinue my argument at this time and save that last five minutes for rebuttal, if necessary.

Justice CLARK. Very well. And in order not to interrupt the argument of the other side by the luncheon period, the Court will take the recess now and resume at 1:45.

(Acordingly at 12:15 p.m., the luncheon recess was taken until 1:45 p. m.)

70 AFTERNOON SESSION

(The hearing was resumed at 1:45 o'clock p. m. at the expiration of the recess.)

Justice CLARK. May I say, Mr. Knowlton, before you start your argument that the Court is particularly interested in the subject of jurisdiction of this Court.

Mr. KNOWLTON. Yes, your Honor. I will take that up first.

ARGUMENT ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION

By

Daniel W. Knowlton, Esq.

Mr. KNOWLTON. If the Court please, respecting the defense in the Commission's answer that the Court lacks jurisdiction of this suit to set aside the Commission's order denying an award of reparation, the Court decisions in like suits or suits where the amount of award is made fails to satisfy the shipper, particularly emphasize that there are decisions in the Interstate Commerce Act specifically directed to the governing of the recovery of damage for violations of the act and, in effect, that the prescribed procedure may not be avoided through a 3-Judge Court asking the setting aside of the order or action.

I have in mind the Rochester Telephone case mentioned by counsel.

71 That was in 307 U. S. 125 and that case says the mere fact that an order is negative does not affect its reviewability but, in that decision, the Court referring

to, and I think quite obviously approving, a prior decision denying an award of reparation. The main basis of the decision was not the doctrine of non-reviewability of negative orders, but the statutory procedure dealing with reparation.

That decision was the Standard Oil case, 283, U. S. 235, but, for purpose of brevity, I am using a recent decision also mentioned, the *Ashland Coal & Ice Co. vs. U. S.* which is in 61 Fed. Supp. 708. I am using that because they both explain the statutory provision governing recovery of damages.

In the proceeding involved in the Ashland case, the Commission had found that certain rates on coal were unreasonable and ordered a reduction in the future. As to the past, however, it found the rates reasonable and denied an award of reparation. The shipper plaintiffs, before the Court, asked the setting aside of that part of the order denying damage or reparation, urging that the Commission's decision as to the rates for the past was arbitrary and beyond its power and they prayed, much as here, that the Court remand the case to the Commission for further action within the framework of power properly
72 exercised.

Taking up its jurisdiction, the Court first outlined the provisions of the Act dealing with reparation, saying substantially that Section 8 provides that any railroad doing any act or thing made unlawful by the Act shall be liable, in damages, to any persons injured thereby.

Section 9 provides that any person complaining of being so injured may either file complaint with the Commission or bring action in a Federal District Court to recover damages, but that such person shall not have the right to both of said remedies but must, in each case, elect which one of the two procedures he will adopt.

Under Section 6 the Commission is authorized to award damages on complaints filed with it and that Section also provides, in covering cases where the railroads do not comply with an award, for action on those awards in the Federal or State Courts.

In the Ashland case, which I am using here as the background for this discussion, after outlining provisions dealing with the statutory provisions for the recovery of damages, it said, citing cases, that the decision established that where a litigant had elected to complain to the Commission and had been denied an award, an ordinary one-judge

Court could not entertain a suit for reparation on the same claim or cause of action, and this, the Court
73 said, brought up the jurisdictional question before it as to whether such complainant having asked for damage from the Commission and having been denied, could sue under the Urgent Deficiencies Act asking a 3-Judge Court to set aside the order or action of the Commission.

The Court said that it thought that the election of remedy provision of Section 9 was an effective bar to such a suit and that the Court, in the Standard Oil case, among others, had effectively dealt with the problem. In the Standard Oil case, a 3-Judge Court suit was involved, similarly, asking for the setting aside of an order of the Commission denying an award of reparation, and there, the Court, in holding lack of jurisdiction, based its decision, in part and only in part, on the doctrine of non-reviewability of negative orders and, on the second ground, it stated that putting the foregoing ground entirely to one side, it still thought that the District Court was without jurisdiction. After quoting from the election of remedy provision in Section 9, the Court said that the appellant, having elected to proceed and having proceeded before the Commission, could not thereafter, on the same claim, proceed by the alternative procedure. That is what the Court said.

Justice HOLTZOFF. Is it your contention that this order of the Interstate Commerce Commission is not sub-
74 ject to judicial review of any kind or is it your opinion it may not be reviewed by a 3-judge court and only by a 1-judge court?

Mr. KNOWLTON. It is very well settled that if it has proceeded before the Commission on complaint of damage, it is also well understood when they come to the Commission, for example, complaining of rates for the future or even asking for findings, so long as they don't ask for damages if and after they obtain the findings they can go to a District Court.

Justice HOLTZOFF. Is it your contention that this Court has no jurisdiction or that no court has any jurisdiction? I am not quite clear as to what your contention is.

Mr. KNOWLTON. You mean after—

Justice HOLTZOFF. I am inquiring concerning the order of the Interstate Commerce Commission involved in this case. What is your position as to whether it is subject to any kind of judicial review?

Mr. KNOWLTON. As I have said, under Section 16, the railroads not complying with an award, the shipper is given an action in the District Court or State Court on the award.

Justice HOLTZOFF. I understand, but I am not quite clear from the answer filed by the defendants in this
75 case whether their contention is that the order here involved is not subject to any judicial review whatsoever, or whether they contend that it is subject to review only by 1-judge court. I am not quite clear as to your position on that.

Mr. KNOWLTON. The truth is that once the election is made and an award gotten or refused,—let's say it is refused—under the decisions a 1-judge court cannot entertain a suit on the same cause.

Justice HOLTZOFF. In other words, your contention is there is no judicial review at all?

Mr. KNOWLTON. And in the 3-judge court I am trying to bring out that the same thing is true.

Justice HOLTZOFF. What do you say about the application of the judicial review provisions of Administrative Procedure Act?

Mr. KNOWLTON. I would say as to that this election of remedy provision gives what Congress has given. They can go before a Court but they cannot go before both. If they go before a District Court, they can get a review all the way up. If they elect to go before the Commission, as they can elect, they can get the finding before the Commission and then go to the Court, as Mr. Mathews mentioned in the El Dorado case today. That was on a contract between a shipper and a car company from which it
76 leased cars and then furnished them to the railroads. Under its contract, it has all of the so-called mileage which is a form of allowance, and that, by virtue of that, he made a large profit and the car company finally refused to pay anything more than the rental he paid. The shipper went into court. It was a single-judge court and the car company defended on the ground of the Elkins Act and said if it paid the amount over to the shipper in excess of the rental he paid, that would constitute a rebate and make him a participant in violation of the Elkins Act. That got to the Supreme Court.

The Supreme Court said there was an Administrative problem involved and told the lower court to hold it in abeyance until the Commission decided it. Then it was taken to the Commission. The Commission did decide it, made no order but made the necessary findings and then

the shipper went to a 3-judge court, instead of going back to a 1-judge court, as in the first instance.

I argued the case and I defended both on the merits and on the ground that there was no jurisdiction of the 3-judge court over findings. I considered there was no order, that they were mere findings.

The election of remedy was not argued and, so far as I could see, there was no question of damages in the sense of an award of damage for some violation by the
77 carriers of the Act. The question was simply what was in that contract and it was between the car company and the shipper, and the Commission determined the rights of both parties.

But what I want to point out is where an administrative question comes up in the court, it is well settled that it can be referred to the Commission so that they have two ways of exercising that election: They can either come to the Commission, say it was in connection with rates in the future or even without that, and get findings as to the reasonableness of that or what-not and then go to the court.

The principal objection I have heard to that is that the statute might run before they get to court. The cases show, and particularly some of the motor carrier cases like the Bell Potato case, that they could first go to a court and advise that court they are asking for damages, but being advised it is an administrative question go to the Commission for it, and that court hold that in abeyance, the Mitchell case, 230 U. S. where the Court, finding an administrative question involved—that was also allowances—sent it back to the lower court with directions to dismiss but stayed the dismissal which is the same thing as holding in abeyance until the decision of the Commission was gotten.

Justice McGuire. Is it your position that, under
78 Section 9 of the Act, the individual litigant has an election proposed to him? He can either pursue his remedy in the District Court or he can go before the Commission?

Mr. Knowlton. Yes.

Justice McGuire. If he goes before the Commission, he is barred from proceeding in the District Court, either before a single judge, or before a 3-judge court, and you predicate that, I assume, on the Ashland Coal & Ice Co. case?

Mr. Knowlton. And others; principally on the Standard Oil case.

Justice McGuire. In the Ashland Coal & Ice case, Judge Dobey reviewed the authorities and predicated his opinion on the Standard Oil case. That is your position?

Mr. Knowlton. You do understand, your Honor, that it is well understood they come to the Commission for the findings say, as to the unreasonableness in the past and, if they don't ask for damage and should they get those findings then they can go to court or they can go to court first.

Justice McGuire. What did the Government ask for here before the Commission?

Mr. Knowlton. That is very much the same and
79 perhaps not quite so definite as the Ashland Coal & Ice case. You remember what I said about the prayer in the Ashland Coal case, that the order be set aside as arbitrary and beyond the authority and that the Court remand this case to the Commission for further action within the framework of power properly exercised. That is not very definite. It certainly is less definite, for example, than the remand in the Standard Oil case.

The remand and prayer in the present case was that the Court adjudge that the Commission's order—and here it is a denial order again—was arbitrary, contrary to law and the evidence; that it enter a decree annulling and setting the order aside, and remand the matter to the Commission for further action not inconsistent with the decree.

Certainly, since the remand requires, to be consistent with the decree, it is not less definite; it isn't a matter of asking for reparation or the amount. The Ashland case asked for a remand for exercise of power within the framework of power properly exercised. Does that explain what I mean?

Justice McGuire. It does, but I thought you had said, before you went to your explanation, that under Section 9
80 of the Act the individual prospective litigant had the choice of an alternative either to proceed before the Commission or to proceed in the courts. If he proceeded before the Commission, he was barred from proceeding in the courts either before a single judge or a 3-judge statutory court.

Mr. Knowlton. If he comes to the Commission and it amounts to asking for reparation, then if he goes—

Justice McGuire. The Commission denies reparation.

Mr. Knowlton. Yes; the shipper, I would say so far as I can see, has nothing then.

Justice McGuire. If you stand on the Ashland case, that is your answer, is it not?

Mr. Knowlton. Ashland and the Allison case, too.

Justice Holtzoff. Has the Administrative Procedure Act, which became a law subsequent to the Ashland case, affected this question at all?

Mr. Knowlton. I wouldn't think so because the statute provides the shipper his remedy and it certainly, in my judgment, has been very much stressed not only by the Supreme Court but the other courts, that that is what Congress intended and meant and it does not deny him anything if he proceeds properly.

Justice Holtzoff. My question was really directed to that part of the Administrative Procedure Act which pro-
81 vides that every final order of the administrative agency to judicial review. I was wondering what your position is as to whether that has changed the rule of the Ashland case.

Mr. Knowlton. That would be partly my answer to it, that he, having statutory election, if he had gotten the Commission finding and then gone to the Court he could have gotten his review all the way up; but, under the decisions as they stand, I am not going to avoid that. Where the Commission makes an award against a carrier, the carrier has his remedy; the 1-judge court, general procedure. I would say that the shipper, if his award is denied and he has come to the Commission and asked for damage, under the decisions I don't know how he could get that review.

My only point is that since it is intended and it is part of the statute and he does have his election, I doubt if the Administrative Procedure Act means to change it.

Do you want me to proceed with the jurisdictional question?

Justice McGuire. That is all there is to it, if you stand on the Ashland case.

Mr. Knowlton. And the Allison case. The Allison case is much the same.

I want to call this to your attention: That Mr.
82 Mathews this morning said these *per curiam* decisions of the Court in affirming these cases, for example, that it might be taken, in citing the Standard Oil case, as authority for the Ashland or for the Allison cases, that they may be a negative order. In the Ashland case that was after Rochester Telephone case and Judge Dobey—it was a Virginia case—referred to the very footnote in

the Standard Oil case where Justice Frankfurter, speaking of the Standard Oil case, in a prior decision denying reparation, says that the main basis of that decision was not non-reviewable but was the statutory scheme dealing with reparation.

What I want to point out is that, when these cases are affirmed on the authority of the Standard Oil case—and that is true of the Ashland and true of the Allison cases, the Court leaves no doubt as to the ground of its affirmance. There is a negative order as the first basis for the Standard Oil and there is a second ground which is to the effect that while overcharges require ordinary interpretation of the statute, nevertheless when it is remanded to the Commission and it is very complex, but the third ground is the election of remedy provision and that is on pages 240 and 241, I think. In affirming the Court does not leave any doubt but names those particular pages of that decision where the third and separate ground, based
83 on the election of remedy provision, is the authority for the affirmance. You find it in both the Ashland case and the Allison case so I don't think there is any doubt that the affirmance, as late as 1945—that was the decision about a year later in 325 U. S., as late as that—the Supreme Court is adhering to that election of remedy.

Coming to the merits, the subject-matter of the Government's complaint to the Commission was that the refusal of the railroads at Norfolk to furnish wharfage and handling service which is the loading and unloading of cars from pier floor on traffic at Army Base Piers 1 and 2 or, in lieu thereof, to pay the Government an allowance for wharfage and for its help in performing the handling service, was an unreasonable practice resulting in rates that were unjustly discriminatory and unreasonable for the future. The Commission was asked to establish new tariffs and require the railroad to pay an allowance to the Government for wharfage and handling. As for the past, injury was alleged and award of damage asked.

First, it is important to mention that it was shown—and I don't think there is any doubt of it in the Commission's report—the railroads are under no basic obligation to supply or furnsh wharves which primarily are water carrier or steamship facilities. The decisions of the Commission have criticized the railroads for going so far
84 as they have in the matter of wharves.

It is also true for the loading or unloading of carload frieght, that there is no basic obligation there. In

either connection, whatever obligation there is exists by virtue of tariff undertaking and practice and the complaint here is that it has been and now is the railroads' practice at Norfolk and other Atlantic ports to include or absorb and thus relieve shippers of the charges of public wharfage and for handling service, that is, the unloading; whereas, after the Army took over the Base piers and its operation, they refused to pay the Government an allowance, in the same or any amount for the wharfage at the Army Piers and for the handling service. While the railroads at Norfolk have, in connection with the trans-shipment of freight to be trans-shipped by the railroads or their agents, absorbed the charges, the wharfage and handling charges of public wharves, they have confined—there is no question about that up and down the coast—the practice to the public pier operator and have not extended it to private piers operated by the owner of the freight. As counsel says, prior to June of 1942, when the Army took back the piers, the piers had been operated by Transport Trading & Terminal Corporation as a public wharfage and as agent of the railroad. By contract that company agreed to perform this handling or unloading service for the railroads, whenever they were obligated to perform, for there were exceptions, and the railroads, in turn, agreed to pay the Transport Trading & Terminal Corporation, the public wharfinger, one cent for 100 pounds wharfage and 3 cents handling service.

Justice CLARK. Which the railroads included in the tariff?

Mr. KNOWLTON. They absorbed that charge.

Justice CLARK. The railroads did not take that money out of their pockets, did they? They added that much on their tariff in figuring the rate, didn't they? That is what tariff means. They stated that they would pay for this service and that was the justification for the extra charge which was figured in the tariff.

Mr. KNOWLTON. To pay the public wharfinger who is not the shipper and who is their agent. It is tantamount and the practice grew up for, as I say, the railroads are under no obligation to furnish them, but where they do the practice grew up, largely perhaps as a matter of competition, because foreign export traffic is very competitive—

Justice HOLTZOFF. The rates fixed in the tariff took that into account, did they not?

Mr. KNOWLTON. Yes. The absorptions in the tariffs are not allowances. Section 1513 provides for the allowances

and the allowances to the owner of the property transported are out of the rates and that provision does
86 not say that the railroads shall pay allowances. It says where allowances are paid, mind you, out of the rate of the shipper they shall be no more than reasonable and the Commission is authorized to fix the maximum. That is to safeguard against rebates. The absorption of the wharfage charge is in a different category, both in fact and in law.

Justice McGuire. Did the rate charged the shipper, in this instance the United States, include the 4 cents per hundredweight which the railroad absorbed, too?

Mr. Knowlton. No; the railroads on this traffic over those piers, and the results of it I am not questioning, do not have to absorb.

Justice McGuire. Before the traffic reached the piers, when it was shipped on board from whatever part of the United States it was shipped, in the tariff charge for such shipment, was this 4 cents per hundredweight included?

Mr. Knowlton. The 4 cents was an allowance. The export rate is a different thing. What is called an export rate is a rate of the railroad, say, from Pittsburgh to Norfolk on traffic which is to move, say, to France. Commonly, that is lower than what is called a domestic rate where from the same origin, the traffic would end at that port. It wouldn't be going beyond and an export rate, therefore, generally reflects the distance and all factors
87 that generally enter into the making of a reasonable rate.

Justice McGuire. But did it include or did it reflect this 4 cents per hundredweight? Do you follow me?

Mr. Knowlton. Yes; I understand what you mean. That is, does it get back to the shipper?

Justice Holtzoff. Would the rate have been 4 cents less if wharfage service were not taken into account?

Mr. Knowlton. I said the railroads absorbed—included and absorbed this wharfage charge and handling charge thus relieving the shipper. I don't question that. That is what happened at all public wharf piers.

Justice McGuire. I don't understand what you mean by the term "absorption."

Mr. Knowlton. Absorbing, well, it means that the service is covered or included in the line haul rate.

Justice Clark. That is precisely the basis of the tariff; what they are going to do for this money. They call it

absorbing. The railroads don't put up that 4 cents a hundredweight, do they? As a matter of fact they charge a higher tariff because, as they call it, they are absorbing that 4 cents a hundred and when they refuse to perform the service, which they did in this case and don't reduce the tariffs, they are taking 4 cents a hundred out of the pocket of every shipper, aren't they?

88 Mr. KNOWLTON. I am not questioning that that is the result of what happens. It is the traffic of the owner at private piers. Where it is the traffic of the shipper, he doesn't get the allowances. It is only at the public piers, municipal and sometimes railroad piers, that it applies.

Justice MCGUIRE. On the public pier, presumably the railroad is charging 4 cents, though, which it pays nobody and puts in its own pocket, and charges the shipper.

Mr. KNOWLTON. I think maybe, if you will let me continue, I will cover these questions. If there is anything specific you had in mind that you wanted—

Justice MCGUIRE. I feel it is very important to know whether or not this 4 cents is charged in the tariff rate, as Mr. Justice Clark has asked, and then when those services were rendered, whether or not by the use of the term "absorption" you mean, as I inferred you meant, that the railroads get 4 cents for doing nothing.

Mr. KNOWLTON. The railroad does not do anything. If it was on a railroad pier, it would not charge the line-haul rate. The line haul rate would include so-called wharfage which is a form of rental for wharves and for the unloading. The shipper would not be charged that at all.

This arrangement of public wharfage amounts to the same thing. The practice started on railroad piers and, in

89 principle, is still continued as public piers operated by public wharfingers because they are agents, made also by contract and by the service they perform.

After the railroads took over, took back the operation of these Base piers, the traffic, as General Fitzpatrick testified, was for military purposes and almost exclusively export. As a result of the Army taking over the bases and terminals and piers there, the traffic, when placed on storage or other tracks which the Army designated, its own property, its own traffic passed from the custody of the railroad to the possession of the Army or Government owner of the traffic.

Under these circumstances, under the terms and under decisions, the traffic lost its character. It was no longer export in the usual sense and, except for a special provision in the tariffs, the Government would not have been entitled to the low export basis of rates which I just explained are lower than domestic rates. They would have paid the domestic rate and there would have been no allowance in the domestic rate. However, at the request of the Navy and Army, the railroads had previously put in this tariff a provision especially providing that that low export basis of rates on foreign traffic moving to foreign countries would also apply—this means generally—on traffic moving to foreign countries through Navy Yard, Navy bases and Army bases so that, after the piers were taken back and operated by the Army, this provision was applied in according the low basis of export rates to the Army on the traffic of the Government but the railroads were not willing to also grant the concessions demanded of the 4 cents on wharfage and handling.

90

Justice McGuire. May I ask you this question, please? As I understand it, previous to the 15th day of June, 1942, the wharfing facilities had been leased to a private corporation and shippers from any part of the country to Norfolk for export trade were charged, in the tariff rates fixed by the railroads, 4 cents per hundredweight for the handling of their goods when they arrived at those piers. The railroads then took that 4 cents per hundredweight and paid it over to the Transport Trading & Terminal Corporation, a lessee of the Government.

Mr. Knowlton. That is right.

Justice McGuire. However, after the 15th day of June, 1942, when the Government took back its property for the purpose of prosecuting the war, the railroads refused to handle Government shipments, but still, in the tariff rates fixed for the shipment of Government property, charged 4 cents per hundredweight.

Mr. Knowlton. Refused to handle?

Justice McGuire. They didn't handle the shipments.

Mr. Knowlton. They didn't have much opportunity to handle.

91

Justice McGuire. In any event, they did not handle.

Mr. Knowlton. It is contended they did refuse, in a sense, but I will go on and tell you why it was impractical.

Justice Holtzoff. They did charge 4 cents for services they did not render. Isn't that so?

Mr. KNOWLTON. They didn't pay the Army. There was a difference between the shipper on a public pier and the Government.

Justice MCGUIRE. They took the 4 cents which they formerly paid the Transport & Terminal Company for the work they did and put it in their own pockets.

Mr. KNOWLTON. I explained they made one concession by giving the low export rate and they were not willing to make the further concession. I want to go into that a little.

Justice MCGUIRE. I would like to go into that all the way; not just a little.

Mr. KNOWLTON. Yes; all the way. Shortly after the Army took back the operation of the Base piers, it wrote the railroads to amend their tariffs to provide for allowances to the Government on wharfage and handling in the amount of 3 cents for handling and 1 cent for wharfage.

It wasn't until a year later that this demand or
92 request was changed to ask the railroads to perform the handling services and the change was explained in a letter by the statement that it appeared it was a prerequisite to an action before the Commission.

When, in the very first case, the army took over the piers, the notice to the railroads was that they would be operated by the Army and, with rare exceptions, or with, I think, the exception that there might be some commercial freight required it was for Government traffic only and, in either instance, the letter said the operations will be by the Army.

The testimony of record shows that, just as I said in the first place, under war conditions and because of changes in orders from overseas, a constant requirement of priorities and so forth, these operations had to be and were under the absolute control and direction of the Army. In this respect, General Fitzpatrick does not qualify his testimony in the least, nor does he qualify his statements and testimony that the amount of civilian labor was inadequate and that troops and prisoners of war were sent there to do this work while about half was civilian labor, as the Commission said in its report, obviously anything but operation by the Army was impractical. In the Commission's report and the evidence, it is well settled that an allowance cannot

be demanded; it is settled by the Supreme Court,
93 unless they do the service, unless they have the opportunity of doing the service and it was shown that what was asked of the railroads was to subordinate its common carrier status to the requirements and needs of the Army.

This is technical and legal but is nevertheless so that while common carrier service within the Act may be a variety of things, it does not include service to a shipper where so subordinated to the needs and directions of the shipper that it becomes the work of the shipper. The Commission relies on the so-called terminal allowance or plant spotting cases repeatedly, I think in seven or eight decisions, upheld by the Court. Spotting is the service of placement of loaded cars at desired unloading points within the plants or on the tracks of the large industries. By custom, in this country, the rates of a railroad to a city or a town include delivery of loaded cars to team tracks; also on the ordinary so-called factory spur siding, but, as for the large plants where there are plant tracks and sometimes a plant railway, usually delivery is made on what are called interchange tracks at the plant. As a ground for contending that they are entitled because the factory usually gets the spotting right at the freight door, there is nothing to interfere, these large plants urged a large amount of traffic as meaning that the service
94 is no more than what would be done, say, on an ordinary spur or team track; but, in a busy plant, there are many interruptions, many delays, and what is pointed to particularly by the Commission and by the Court is that the service has to be and is in almost all cases, under the direction of that plant, has to be under its control and has to be coordinated. That is what is wanted, to begin with; feed the traffic, the coal and oil, as and when wanted in the operation of the plant, so that the result is that it is called plant or private service, and that is what it is.

In a decision by Justice Cardozo in the General Electric case which came up long ago in the Court of Appeals in New York, considering the conditions at their plant, he said plant spotting—the placement of cars—is not common carrier. It is the plant's own work.

Chief Justice Stone, in a quite recent case, *U. S. vs. Wabash Railroad*—I have forgotten the volume—said that the controlling question was whether this plant spotting, as found by the Commission, was not common carrier but plant, and said the evidence supported that it was. Both decisions stress the necessity for coordination and direction and the subordinating of the carrier so that it becomes nothing more than an electric train performing like service in a plant.

Justice CLARK. Mr. Knowlton, you have consumed
95 the hour that you requested.

Mr. KNOWLTON. May I read this?

Justice CLARK. Of course. It is taking some of your time. If you can conclude very briefly, I wish you would do so.

Mr. KNOWLTON. I will in about two minutes, your Honor.

Justice CLARK. All right.

Mr. KNOWLTON. (Reading) "Providing a wharf and handling freight at the complainant's piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property, at his own convenience and expense before or after the transportation is performed. The defendants may not be required, therefore, to provide a wharf or handle the freight on the complainant's piers and, not being required to do so, they are not compelled to pay an allowance in lieu thereof."

It cites the Commission's spotting cases, the propriety of operating; 209 I. C. C. 11.

I want to call one more thing to your Honors' attention: That those cases, the first one went up in the American Sheet & Tin Plate, five cases from Pittsburgh in plants around there and the Commission's order to
96 resist paying allowances were sustained. Other cases came up involving different plants and they were sustained.

The point I want to make is that there were tariffs in the carriers' rates similar to what are called allowance tariffs. Justice Roberts in the decision meets the very argument that since the provision of the tariffs require the allowances to be paid, why it was a requirement of the tariff. Justice . dissented on that but the point is it was not common carrier service and not susceptible to coverage by a tariff.

Justice CLARK. Mr. Cousins.

ARGUMENT OF BEHALF OF THE RAILROAD INTERVENORS BY WINDSOR F. COUSINS.

Mr. COUSINS. May it please the Court, I speak for the railroad intervenors, the several railroads who serve Norfolk and some of those against whom the Government's complaint was originally brought.

I want to speak on the jurisdictional question rather briefly and I want to talk about the merits. I think I had better talk about the merits first, because we have just left

off on that point, but I cannot avoid saying, right at the outset, that this Court is occupying a unique position today.

97 So far as I have been able to find, no judge ever sat before in a case of United States versus United States. I want to show very clearly, a little later on, that this case is just that; only that; that it cannot be anything else but United States versus United States with the same attorney general for the plaintiff who represents the defendant.

Having put that thought in the mind of the Court and relieved myself of the commitment I have been under, because it has not been mentioned before very clearly, I want to say a word immediately about the merits of the case. This was no racket. There has been no unjust enrichment. The Government has not paid for any service that it did not get. The railroads did not charge any extra rate for some work they did not do. There is nothing to that thought at all. Whatever you call it, there isn't anything to it.

I anticipate a little difficulty in explaining to a court how a freight rate is made and making the Court understand just why and how a certain factor and increment or addition is not there or is there. I am going to try to do that but I want to protect myself a little bit before I do that, just in case I am not successful. I want to do that by saying,—and not challenging the Court at all,—but I want to point out that the Commission so found. It made a finding, the very one that I have stated to you and that in the end, the only burden that I have here to-

98 day is to show the Court that there is some evidence of record to substantiate that finding.

I don't think I have to convince the Court that the Commission was right, but only that it had evidence upon which to act. I think I can convince the Court, but at least I have a way to beat a retreat if I don't. It has been said for 50 years that the railroads have done certain things along the Atlantic Coast at the ports, and I will start on that tack by saying that, for 50 years, the railroads have never done what the Government asks in this case. For 50 years, the railroads have never at Atlantic ports gone on a pier, operated by the owner of the freight, and loaded and unloaded his freight from cars for him. That has never been done.

The Government did not really ask that it should be done. What the Government asked was for an allowance, a payment for doing it itself in lieu of having the railroads perform. As to that, that is another point. Never in 50 years

have the railroads paid an allowance to a shipper for this kind of service on a private pier or any other kind of pier. That is broader. We have not unloaded on private piers, but we have not paid allowances on any kind of piers.

This service did start a long time ago; started on railroad piers because the railroad had some freight to
99 deliver to a steamship, really a sailing vessel when it started, and there it was on the railroad's pier. The shipper wasn't there. He was back inland some place. He wasn't there to unload his freight. Anyhow, the railroad didn't want him on its pier. It wanted to run its own pier and have control of it and not have people coming on there interfering with the freight, so, for that reason and possibly for reasons of competition to get business and other things, the railroads began this practice of unloading export freight from cars.

That is a very unusual practice. Ordinarily, freight is unloaded by the shipper in this country. That is his obligation and, if the Court will permit me to file a brief at a later date in this case, I would like to furnish citations for that statement and for many other things that I will say so that I won't have to cite cases for every point today.

Justice CLARK. How much time do you want to file a brief?

Mr. COUSINS. Would two weeks be an unreasonable request?

Justice CLARK. Does the Interstate Commerce Commission desire to file a brief?

Mr. KNOWLTON. We would like two weeks.

Mr. MATHEWS. If the Court please, we have handed
100 in our brief. However, if the Court has in mind to terminate the argument shortly, I would like to have the privilege of filing a reply brief within two weeks, or some such matter.

Justice CLARK. Very well.

Mr. COUSINS. This practice of unloading export freight on the piers has gone on through the years but it has been restricted and limited. It has been held down to railroad piers or other public piers, that is, piers operated by wharfingers.

One of the judges referred to the operation of this pier as by a private corporation. Yes, of course, the Terminal Transport Trading Company was a private corporation, but it was in the nature of a public utility, a public wharfinger, not merely a private corporation.

Justice HOLTZOFF. Did the railroads in Norfolk have enough facilities to have handled all this heavy traffic as it increased during the war years, if the War Department had not stepped in?

Mr. COUSINS. They had the facilities the War Department took from them, certainly. The answer is obvious.

Justice HOLTZOFF. Did they have the labor?

Mr. COUSINS. No one can answer that question, your Honor, because we don't know. What we say as to that is this:

101 The railroads never could have operated that facility in the way the Army operated it. We could not have operated it under Army methods with boats coming in and taking half a load and going back into the channel; with freight being taken out of cars and somebody changing his mind and it being put back in cars and sent back to the warehouses and back into storage yards. We cannot operate business that way. That was Army war time operation with decisions being changed every 24 hours; some days on an eight-hour shift; some days on a 24-hour shift. We don't say we can comply with that kind of business but we would have operated the pier if the Government had not taken it over.

The Army piers at other ports were not taken over. We operated for the Army at Baltimore and Philadelphia and at other ports in the usual manner. The Army would have had the freight unloaded free. It would have had its wharves supplied by the railroads if it had just sat tight and let the situation continue, but that did not suit the Army.

Justice HOLTZOFF. You were relieved of the cost of doing that work, were you not?

Mr. COUSINS. Yes; certainly. The Army took our facilities and said, "You pay us".

Justice CLARK. I want to know where that 4 cents went.

102 Mr. COUSINS. I got off the track. I haven't shown you there was no four cents. I have forgotten my main point here.

I wanted to read you what the Commission said about the finding which I am now trying to support.

"The line haul rates in question are less than reasonable maxima and nothing has been added to them to cover the cost of wharfage and handling."

Nothing has been added to cover those features.

"In other words, the carriers never have particularly considered wharfage and handling costs in making the rates."

We will show that in many ways.

Justice McGuire. Let me ask you this question right there: If the 4 cents was not included in the rate, then do I take it the carrier paid the private corporation 4 cents for handling the freight as a gratuity?

Mr. Cousins. Not as a gratuity but paid it out of its own pocket.

Justice McGuire. Let's put it this way: The shipping was, let's say, a dollar. Do I understand when the goods arrived at the pier that the carrier had the goods unloaded by the corporation for the benefit of the shipper and paid the corporation 4 cents for doing it?

Mr. Cousins. Yes, sir. Of course, the 4 cents that
103 the railroads paid their agent had to come out of the revenue. There wasn't any other place for it to come from and, technically, it was included in the rate, but, actually the 4 cents had never been added into the rate in the first place. All of this export freight that has been moving over the private piers for years pays the same export rate and did not get the free unloading.

Justice McGuire. What do you mean by "technically included in the rate"? Let's take my example of a dollar.

Mr. Cousins. Your Honor, this 4 cent payment, the free unloading service, comes as close to a free service uncompensated for as anything you can get but, under the law, the railroads cannot give away their services. They cannot unload for nothing, so there is a fiction there that the freight rate covers the cost. It includes the cost. Out of the freight rate, the railroad absorbs the cost; but what I am saying to you is this—

Justice McGuire. The freight rate is paid by the shipper so the shipper is absorbing the cost.

Mr. Cousins. It is in the rate, technically, but no extra amount was ever put there.

Justice Holtzoff. Wouldn't the rate have been 4 cents less?

Mr. Cousins. Not at all.

Justice Holtzoff. If the railroad assumed it
104 wasn't going to furnish the service?

Mr. Cousins. No. Your Honor, this service has only been rendered at the public piers that I tell you about, for years. All of the other export freight, and there are private piers all up and down the coast, all of them pay the same export rates. They don't get this free service and yet they pay the same rates. Various types of ship-

ments, all freight on open cars, all freight in tank cars, bulk freight and certain other exceptions do not get the free loading in any circumstance and yet it pays the same rates. Those are the technical ways in which we prove that the rate does not contain any increment or additional factor to cover this special service. On the contrary, the Government got a concession.

If a private shipper had taken over this pier, as the Government did, and operated it for its own account, it would not have received the export rate. It would have paid the higher domestic rates and the record shows how much higher they are.

Justice McGuire. Mr. Cousins, let's be practical. What you are saying, in effect, is this: Since the rate reflected no increment to cover the cost of the service rendered, as far as the situation was concerned when the private corporation operated the wharves, the railroads were paying 4 cents per hundredweight for the unloading
105 of the shipper's goods.

Mr. Cousins. For the unloading and wharfage, yes, sir.

Justice McGuire. And whatever else was done?

Mr. Cousins. Yes, sir.

Justice McGuire. And they were paying that out of their own pocket?

Mr. Cousins. Yes.

Justice McGuire. Because there was nothing in the rate charged the shipper for that loading service?

Mr. Cousins. The corporation gave a special service and they paid them just the same as they paid me. I am an employee. He was an agent.

Justice Mc Guire. You paid him 4 cents without any reimbursement at all from the shipper?

Mr. Cousins. Yes, that is correct, and the Commission so found; and you cannot get away from it when you consider the same export rates have always applied no matter whether the shipper got this service or not.

Let's look at this in a little different way. May I say, in passing, that there is nothing new or novel about this. It has been passed upon in a long line of Commission cases. The Government did not think this theory up. Again and again private pier operators have brought cases before the Commission saying they wanted to get in on this, that
106 somebody else was getting paid, that is, our agents, but they weren't. They wanted to be our agents, too,

just exactly the way the Government wants to be our agent and the Commission has passed upon this situation time and time again in seven or eight different cases, most of them which I happened to handle myself. They are cited in these reports and I will be glad to deal with them at more length.

Justice McGuire. I take it the carriers compromised this case with the Government which has a different view than yours.

Mr. Cousins. It had a different tax situation from mine.

If your Honor please, let me approach this from just a little different standpoint. I am not concerned for the moment whether the shipper paid the 4 cents or not. Let's assume that he did, if you wish, and I want to make this point: The railroad's obligation at most was to unload. A railroad has no obligation to pay an allowance unless it prefers not to render the service.

That is old law. It was established in Ateison Railway versus U. S., 232 U. S. 199.

Therefore, in this proceeding, if the railroad had any duty for this mysterious 4 cents, it was to perform service; not to pay a rebate to the Government. We have no such obligation. We had the right to do the work, but in
107 this case, we had no such opportunity.

The Government never intended that the railroads should do the work. They didn't want the railroads to do the work and they did not have a situation in which it would have been possible for the railroads to do the work. In Exhibit 1, evidence of the Government itself and everything I say on this point is taken from Government witnesses, they describe this operation; not railroad witnesses. Every bit of the evidence on this point is from Government witnesses. Exhibit 1 shows that, for a year when the Army was negotiating with the railroads about this situation, all they asked for were allowances: never once to have any work done. The correspondence shows that the Army intended to do the work itself; that it said it would do it. That is why it took over the piers. Otherwise, it did not have to take them over.

Then, when we had gone along about a year without getting any place, we got the first request to perform some work and the letter said, an exhibit of record,

> "This is necessary that we make this request as a prerequisite to filing a complaint before the Commission."

Then there was another formal request without any qualification but from that time on to the hearing and all through the the operation it was clear that the rail-
108 roads could not have done the work under the Army methods and this is significant: When the complaint was filed to the Commission in April, 1944, almost two years after the Army had been in possession of the pier, it did not ask the Commission to require the railroads to perform any service. It asked solely for money back, for an allowance or a reduction in rates. They never did want service.

Mr. Knowlton has mentioned briefly, the fact under the railroads' right to perform, that they could not have done so under Army methods and I have touched on that very briefly. I don't want to go into that any further. It is in the record. We will furnish the references to the testimony, and all I ask you to do is to find that they do support, whether you will agree with them or not, but there is enough there to justify the Commission in making up its mind and in coming to that finding which it has made.

In order to conserve our time, although I had intended to talk about the merits on some of the other issues, this is not merely a case attacking the reasonableness of the rate, but there is a question of tariff interpretation and things like that. I would like to pass over that and supply in my brief and again show specific rulings of the United States Supreme Court that, under those various sec-
109 tions the Commission has the final say if there is any support for its evidence, that they are matters for administrative determination. I emphasize the point because I think we have talked so much today as if we were arguing this before the Court *de novo;* as if it were up to us to convince the Court one way or another and all we have to convince the Court of is the fact the Commission had some justification for coming to its views.

The Supreme Court has said that the reviewing court will not consider the expediency or wisdom of the order or whether, on like testimony, it would have made a similar ruling. That is what I am trying to say. That is *Interstate Commerce vs. Union Pacific*, 222 U. S. 541. Now, I will pass from the merits and talk a very few moments about the jurisdiction of this Court to review.

I have two points on that. Mr. Knowlton dealt only with one. He doesn't go along with me attacking the standing of the Department of Justice here, as such, although he does go along on the theory that the order is not reviewable

because of Section 9 of the Interstate Commerce Act. There isn't any doubt in the world but that, under the law today, this order is not reviewable by this Court. You will have to overrule the Supreme Court if you come to a different conclusion. In support of that, I cite the Standard Oil case, 283 U. S. 235 which, by name, was not
110 overruled in the Rochester Telephone case, 307 U. S. 125, which did throw out the negative order theory but maintained the validity of the Standard Oil case and then the Ashland Coal & Ice Co. case.

In the statutory Court which has been mentioned, and which was affirmed by the United States Supreme Court in 325 U. S. 840, not on any vague or unknown ground as Mr. Mathews suggested this morning, but on the very specific ground as urged in the motion filed by the Department of Justice and signed by the Assistant Attorney General, Mr. Sonnett, who executed the petition in our case and who also executed the defendant's answer in our case, the case was affirmed by the Supreme Court citing the Standard Oil case.

I don't see how we can get away from the fact that is still good law. Let me mention another thing. It is sometimes difficult to decide which side the Department of Justice is on, as it is here. There is another proceeding of review going on at the moment of a case just exactly like this; a review of an Interstate Commerce Commission order. It is pending in the District Court for the Eastern District of Michigan. It is Civil Action No. 6295. It has not yet come to trial and, therefore, it is behind our case but briefs have been filed and in that respect it is ahead of our case. I have in mind the brief filed in behalf of the United
111 States. It is not dated but it has been submitted to the Court and is of current date because, as I say, there has been no trial of the case. Here is the first heading in the Government's brief under its argument:

> "Plaintiff having elected to seek reparation from the Commission, this Court, by virtue of Section 9 of the Interstate Commerce Act, cannot entertain a suit to enjoin the Commission's order denying reparation."

It cites all of the cases that I have just mentioned plus a half dozen more that I won't bother with.

Justice Holtzoff. Are Government counsel the same?

Mr. Cousins. Government counsel in the Michigan case are not Mr. Mathews and Mr. Moore, but they are their associates, Mr. Dumbould who sits in back of them, and their

superior, Mr. John F. Sonnett, who executed, as I say, both the petition and the answer in our case.

Mr. DUMBOULD. May it please the Court, as a member of the bar of this Court and as amicus, may I state in reply to what has just been said about my name that this brief that he has in his hand is a joint brief filed on behalf of the United States and the Commission and it was written by Mr. Edward M. Ready of the Commission's staff and it covers the defenses raised in his answer which involved the same defense that my friend raises here, and it also covers the defenses raised in the answer of the United States
112 which does not raise the point that he raises here.

Justice CLARK. I don't think we need to hear any argument in the Michigan case. It is immaterial, in the first place, and I think the interruption was more immaterial.

Mr. COUSINS. Of course, we are in both cases and we would like to know what the Department's views are on some of these questions. I won't say a word about the El Dorado case which Mr. Mathews mentioned at length this morning because we don't contest that principle. That goes to the negative doctrine theory which has been decided by the Rochester Telephone case, as Mr. Justice Brandeis said in the El Dorado case. I take no exception to that at all because I don't think it affects our point.

I make just one more comment on this subject. I listened very closely to Mr. Mathews deal with this particular point this morning and I thought I saw a basis in his argument for making a distinction between a tariff interpretation issue; a case to the Commission alleging that under the tariffs themselves, a complainant was entitled to reparation and other issues such as the tariffs were unreasonable and discriminatory and so forth, and he may have put himself in a position to contend that that is the Michigan case, that that is a tariff interpretation proceeding, not as
113 broad as ours. Well, if he does, I will accept that provided this Court will accept that same doctrine in this case to the extent that the tariff interpretation issue arises. It was argued at some length this morning that we have a tariff interpretation issue here and, if the Government agrees that the Standard Oil case is still good for that type of issue, why then the review in this proceeding is precluded in part, at least.

If the Court please, I want to talk about litigation between the United States on the one hand and the United States on the other hand. There is only one way to review

an order of this type of the Interstate Commerce Commission, and it comes up under Section 208 of the Judicial Code found in 28 U. S. C. A. 46:

"Suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought in the District Court against the United States."

There is no basis upon which a suit can be brought against anybody else. It would be improperly brought. You cannot sue the railroads and you cannot sue the Commission.

Now, to put a better face upon the matter, the Government filed its petition here, "United States vs. Interstate Commerce Commission and United States," and my friend, Mr. Knowlton, did not ask to be dismissed.

114 I assume that he concluded he was coming in anyhow as an intervenor and he might as well ride along in with the Government instead of getting it the hard way.

Justice Holtzoff. Isn't this just a form for the purpose of securing a review of a decision of the Interstate Commerce Commission, rather than being a case of the Government suing itself? In other words, the Government as a shipper does the same as a private corporation as a shipper, and it seeks a review of an order of the Interstate Commerce Commission.

Mr. Cousins. The question then arising, whom is the Government suing if not itself? It has no right to name anyone else as a defendant.

Justice Holtzoff. It has named the Interstate Commerce Commission as a defendant.

Mr. Cousins. It has no right to do so. The Commission could have been dismissed without any doubt. The same judicial code, sections 212 and 213, provide the only manner in which the Interstate Commerce Commission gets into a case of this kind and that is by intervention which it may do, but it is up to it to decide, not up to the Government. The same section of the Code and this is 28 U. S. C. A. 45(a) says:

"The Attorney General shall have charge and con-

115 trol of the interests of the Government in the cases specified,"

and so forth. He is in charge of the defense. Where would this Court have been today if the Interstate Commerce Commission had been dismissed, assuming it has the right to do, and the railroads had not intervened? Would you have had a case or controversy before you? Of course,

they have a large number of lawyers. They could divide up and some get on one side and some get on the other.

The United States, if your Honors please, is not merely a formal defendant. This is not merely a formality. It did not get into the law inadvertently. It was debated at great length when it got into the Act in 1910 in the Elkins Act. It has been a controversial point. It has been debated in the present Congress as to whether the United States or the Interstate Commerce Commission should be a defendant in a case of this type. The debate has been on who should defend an order of the Commission, that is, who is the Commission? And the answer is; "It is the Government." The interests of the Government are in charge of the Attorney General. He is to defend. That does not allow very much leeway for his function to attack. The views were, when the legislation was passed, that he was to defend. That was questioned. The Attorney General was not trusted entirely by some of the Congressmen, just as he is not trusted entirely by some in the bills in
116 the Legislature now pending where there is another effort to change it, and, for some reason or another, the Department of Justice has always resisted any change and is to this very day and the present Attorney General is also resisting it; but the subject back in 1910 in the Elkins Act was debated at great length.

This debate covers dozens of pages that I am sure it will be of great interest to the Court but I am going to read, of course, just a very little bit. I am reading generally from Volume 45 of the Congressional Record, page 6461 and in that vicinity where they were talking about the interest of the Government on the one hand or the interest of the Commission on the other, and who should be the same defendant, and Senator Hayburn of Utah said:

"It would certainly be intolerable to have one branch of the Government attacking another branch in the Courts."

Justice McGuire. Why did the railroads intervene? Why not let the Government fight it out with the Government?

Mr. Cousins. I think maybe we should have, but I was fearful my friends would not bring the point to your attention.

Justice Holtzoff. By intervening, though, you have destroyed the moot character of the case, if it ever had
117 a moot character.

Mr. Cousins. No, I cannot go along with that, if your Honor please. There was either jurisdiction under

the statute when the case was brought, or there wasn't. Our intervention does not add anything to what the law permitted.

Justice Holtzoff. I thought your point was not that there was lack of jurisdiction, but this is a moot case by the Government suing the Government, so that by coming in as an adverse party, haven't you destroyed the alleged moot character of the case?

Mr. Cousins. I made both points that you have mentioned. One is an interpretation of the statute. I say that you cannot bring an action of this kind except under the statute and the statute does not permit an interpretation which results in United States vs. United States.

That is, that it doesn't contemplate the Government reviewing this type of order. That is under the statute.

Then, in addition to that, I say there is no case or controversy under the Constitution and under either of those theories, which are separate, distinct, under either of them I don't think anything has been cured if you don't have a case or controversy at the outset, by having some intervenor come in, such as we are. No order can be made against us here.

118 This language from the Senate is very interesting.

In one of the colloquys that occurred, Senator Hayburn criticized a part of the bill which, at that time, proposed that suits should be brought by or against the United States, and Senator Cummins replied:

"Mr. President, I cannot conceive of any such suit as that just mentioned by the Senator from Utah."

Justice Holtzoff. Are you going to put those quotations in the brief?

Mr. Cousins. Yes. I will read just one more, if you will permit me.

Justice Clark. I was going to suggest, Mr. Cousins, if you are going to write a brief you can put those excerpts from the debate in there.

Mr. Cousins. All right. I think the Court will find them interesting.

Prior to that Act of 1910, it had been customary to sue the Interstate Commerce Commission as a corporate entity, but the Supreme Court has made it very clear that that situation no longer exists.

There have been cases, if your Honor please, which hold that you cannot have suits where the Government is on both sides. There never has been one of them that has been

filed like this case, so far as I know, but there
119 have been some that have been so in principle and I will just refer to two. The Globe & Rutgers Fire Insurance case, in 273 Fed. 774, a case in the Second Circuit where *certiorari* was denied, grow out of a marine accident and, although there was an insurance company as plaintiff and the Director General as defendant, both of them represented the railroad. The railroads had been taken over by the Director General and although the parties happened to be different in form, the Court said:

> "It is elementary that the same person cannot be both plaintiff and defendant at the same time in the same action."

It explained how the Director General ran up against that difficulty in that case. More recently, in *Defense Supplies Corporation vs. U. S.*, 148 Fed. (2d) 311, again the Second Circuit and again *certiorari* denied, the Court said.

> "It seems clear to us that the complete ownership of the Defense Supplies Corporation by the United States shows this to be nothing more than an action by the United States against the United States."

It declined to accept any such lawsuit as that.

I will deal in my brief with the point whether our intervention changes the situation in any respect. We have several cases that I think will persuade the Court.
120 I just want to say when the Court considers these points that I have made, it may come to the conclusion or it may at least be bothered by the thought that, if it is true that the United States cannot seek a review, that it is treated differently from other shippers, but that is not a strange situation. That will be true if you accept the view I have outlined today, but there is nothing strange about that because the United States is treated differently in the Act right now. Section 22 of the Interstate Commerce Act permits the railroads to grant the United States free transportation or transportation at reduced rates, but it cannot do that for anybody else. Section 3, paragraph 2, permits the railroads to give the United States credit whereas it is only on a cash basis with other shippers. That shows that where Congress intended the United States should receive special treatment, it knew how to handle it and, if it had intended in the Judicial Code that the United States should have the right to review an action of this kind and thus could be plaintiff against itself, I think it would have indicated so by clear language.

Thank you.

Mr. MATHEWS. I have just two points. I understand I have five minutes.

Justice CLARK. If you are going to write a brief,
121 you might put them in the brief.

Mr. MATHEWS. I will be very glad to do that, your Honor.

(Thereupon, at 3:30 o'clock p.m. the hearing was concluded.)

Certificate of Official Reporters

WE, the undersigned reporters of the District Court of the United States for the District of Columbia certify this record to be the official transcript of the proceedings indicated.

JEANETTE RAWLS.
THOMAS O'NEAL.

122 Civil Action No. 4729—47.

In the District Court of the United States
for the District of Columbia

(File Endorsement Omitted)

UNITED STATES OF AMERICA, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, DEFENDANTS

Petition to Enjoin and Set Aside Order of Interstate Commerce Commission—Filed Nov. 20, 1947.

123 I

The petitioner, the United States of America, brings this petition against the Interstate Commerce Commission and the United States of America, for the purpose of suspending, enjoining, setting aside, and annulling a certain order made and issued by the Interstate Commerce Commission (hereinafter sometimes referred to as the Commission) on July 25, 1947, in a proceeding before the Commission known as *United States of America* v. *Aberdeen & Rockfish Railroad Company, et al.*, Docket No. 29117. Copies of said order and three reports made by the Commission in that proceeding, which by the terms of the

order were made a part thereof, are attached to this
124 petition and made a part hereof by reference, as Appendices I, II, III and IV, respectively.

II

This action arises under the United States is made a defendant herein, and the jurisdiction of this court rests on the Urgent Deficiency Act of 1913, 38 Stat. 219, 28 U. S. C., Secs. 41, 43–48, and Section 17 (9) of the Interstate Commerce Act, 54 Stat. 916, 49 U. S. C. 17.

III

This petitioner, acting by and through its War Department, in the performance of its military functions and in the prosecution of the war, has shipped over the lines of the several trunk line railroads serving the port of Norfolk, Virginia, a substantial volume of goods from various points in the United States to Norfolk, Virginia, for transportation by vessel to points beyond Norfolk, and has shipped over the lines of these same railroads from Norfolk, Virginia, to various points throughout the United States a substantial volume of goods which have been transported to that point by vessel from points beyond Norfolk. These shipments consisted of so many different items that it is impractical to list them in this petition. The transportation charges on such shipments have been, or will be, paid by this petitioner.

IV

For many years water-rail traffic has been interchanged over piers at the Port of Norfolk, Virginia. Among
125 such piers are Army Base piers 1 and 2, which for over 20 years have been among the principal pier facilities at that port for the handling of general import, export, coastwise and intercoastal traffic, interchanged with the railroads serving the port. Army Base piers 1 and 2 were built by this petitioner shortly after World War I, and from April 1920, until June 15, 1942, were leased to private interests, known as terminal operators, for commercial peacetime operation as public terminals. Soon after completion, these piers were leased to the City of Norfolk, which operated them as municipal terminals until September 1, 1925. Norfolk Tidewater Terminals, Inc. then leased the facilities and operated them until July 1, 1940. From that date to and including June 14, 1942, these piers were leased to and operated by Transport Trading and Terminal Corporation.

V

Due to the emergency caused by its participation in World War II, it became necessary for this petitioner to supervise the operation of all Atlantic coast deep-water terminals in order to supply its armed forces overseas. As the result, the Hampton Roads Port of Embarkation was established to embrace the principal port facilities in the Norfolk area, including Army Base piers 1 and 2. Thus, effective on June 15, 1942, the lease of Army Base piers 1 and 2 to the Transport Trading and Terminal Corporation was cancelled and thereafter this petitioner's War Department operated these piers.

126

VI

For more than 50 years, it has been the general practice of railroads serving North Atlantic ports, including Norfolk, to load from pier to car and unload from car to pier water-borne traffic which they move by rail to and from those ports. Many of the railroads serving the Port of Norfolk do not own piers where they may perform this service, but they provide the necessary facilities under contracts with terminal operators who act as their agents and furnish wharfage, or pier facilities, for the use of these railroads, and perform handling of freight consigned to and from those facilities.

VII

At all times during which Army Base piers 1 and 2 were leased and operated by private terminal companies, the railroads serving the Port of Norfolk, with certain exceptions not material here, held themselves out in their tariffs applicable to traffic moving on shipside rates to and from that port to absorb the cost of wharfage and handling of such traffic between cars and pier floor. Those railroads have in practice, delivered the cars on piers owned and operated by them or their agents, the local terminal companies. Under this arrangement, they paid the Transport Trading and Terminal Corporation a charge of 1 cent per 100 pounds for the use of the piers and a charge of 3 cents per 100 pounds for its loading or unloading service. Soon after the War Department assumed the handling of freight over these piers, it made a number of requests in

127

writing that the railroads pay to it an allowance for wharfage and handling services equal to the amount that had been paid theretofore to the terminal operators for this same service. These requests were refused and

no allowance for wharfage and handling was made to this petitioner by the railroads. Instead, the railroads continued to charge the full line-haul rates for the transportation of this petitioner's traffic moving on shipside rates over Army Base piers 1 and 2, and they failed and refused both to provide wharfage and perform the handling services, as contemplated by their tariffs, and to make any allowances for these facilities and services.

VIII

During the time these piers were leased and operated by the terminal operators, handling of the freight between cars and pier floors was performed by the terminal operator with civilian labor. After the War Department took over these piers the handling service was performed by it with the same civilian employees, under the same supervisory force, and in the same manner as it had been performed previously by the terminal operator. The responsibility of the defendants under their published tariffs was therefore discharged in substantially the same manner by the War Department as theretofore by the terminal company. On May 22, 1943, the War Department requested the railroads to perform the handling service on its traffic to the same extent that such service had for many years been included in the line-haul shipside rates. The rail-
128 roads likewise refused this request and at no time after the War Department assumed the operation of Army Base piers 1 and 2, did they offer to perform, or perform the handling service.

Thus, prior to 1942 wharfage and handling between cars and ships at the particular piers here involved were provided by private interests and the charges therefor, totalling 4 cents per 100 pounds, were absorbed by the railroads. But when this petitioner found it advisable or necessary, on account of the exigencies of war, to take over these terminal facilities, the railroads refused both to continue to perform the handling services and to reimburse this petitioner in any amount for the use of the wharfage facilities and the cost of handling, which it was forced by this refusal to assume, with the final result that this petitioner had been deprived of the full service to which it was entitled under the shipside rates, and the line-haul carriers have collected and retained compensation for services which they did not perform.

IX

As the result of the railroads' failure and refusal to provide wharfage facilities and to perform the necessary handling services or to make an allowance therefor, on April 15, 1944, this petitioner filed with the Interstate Commerce Commission a complaint alleging that such failure and refusal constituted violations of Sections 1 (5) (a), 1 (6), 2, 6 (8), and 15 (13) of the Interstate Commerce Act.

There was sought for the future an allowance to this
129 petitioner for the wharfage and handling services provided on this traffic or, as an alternative, an order requiring the carriers to render such services, or a segregation of terminal charges from the line-haul shipside rates; and an award of damages on past shipments on which this petitioner has been required to assume the expense of wharfage and handling.

The defendant carriers, by separate answers, denied generally the allegations of the complaint. The proceeding was heard at Norfolk, Virginia, on July 18 and 19, 1944. The parties excepted to the examiner's proposed report and on April 5, 1945, the issues were argued orally before Division 2 of the Commission.

Thereafter, the Commission, by Division 2 (Commissioner Barnard dissenting), by order of August 3, 1945, found that the refusal of defendants to furnish wharfage and perform handling services or to make a reasonable allowance to the petitioner in lieu thereof, was an unreasonable practice, in violation of Section 1 (6) of the Act, and was unjustly discriminatory, in violation of Section 2. The Commission awarded reparation at the rate of 4 cents per 100 pounds with interest. (See Appendix II.)

X

Thereafter, on petitions of certain of the railroads, the proceeding was reopened for reargument and reconsideration, and the effective date of the order made on August 3,

1945, was postponed indefinitely pending final dis-
130 position of the matter. On May 3, 1946, the Commission (Commissioners Aitchison, Splawn, Alldredge and Rogers dissenting) reversed its prior decision, vacated its order, and dismissed the complaint (See Appendix III), finding that the railroads' refusal to make this petitioner an allowance or to perform the services or to state in their tariffs the wharfage and handling charges at Norfolk separately from their rates was not shown to have been an un-

just or unreasonable practice, or to have resulted in unreasonable or inapplicable rates, or to have been unjustly discriminatory to this petitioner.

XI

Thereafter, upon further consideration of the record, and upon consideration of petitions for reargument and reconsideration, the proceeding was reopened for reargument, and on July 25, 1947, the Commission (Commissioners Aitchison, Splawn, Johnson, Alldredge and Rogers dissenting) affirmed its findings in the prior report on reconsideration and ordered the complaint dismissed. (See Appendix IV.)

XII

The order of the Commission of July 25, 1947 (Appendix I) is unlawful and void, and beyond the power of the Commission to make for the following reasons:

(a) Said order lacks a rational basis in that the findings made by the Commission do not support its ultimate conclusions;

131 (b) The Commission failed to make essential findings of fact that would support rationally the order made by the Commission;

(c) The findings of fact made by the Commission are not supported by any substantial evidence;

(d) In making said order, the Commission misapplied law;

(e) The Commission's order is otherwise arbitrary, capricious and without support in and contrary to law and the evidence.

XIII

By reason of the arbitrary and capricious action of the Commission in entering its order of July 25, 1947, this petitioner is left without an adequate remedy at law and it will be subjected to irreparable damage if the relief hereinafter prayed for is not granted.

Wherefore, this petitioner prays that:

1. Pursuant to the statutory provisions referred to in paragraph II of this petition, there be constituted to hear this case a special court of three judges, one of whom shall be a circuit judge;

2. Upon final hearing and submission herein, the Court adjudge and determine that the order of the Interstate Commerce Commission of July 25, 1947 (Appendix I), is unlawful, arbitrary, capricious, without support in and contrary

to law and the evidence; that a decree be entered perpetually enjoining, setting aside and annulling the said
132 order; and that the matter be remanded to the Commission for further action not inconsistent with this Court's decree; and

3. This petitioner have such other and further relief in the premises as the nature of the case shall require and to this Court shall seem proper.

JAMES E. KILDAY,
DAVID O. MATHEWS,
Special Assistants to the Attorney General.

FRANK F. VESPER,
JAMES C. MOORE,
Special Attorneys.

TOM C. CLARK,
Attorney General.

JOHN F. SONNETT,
Assistant Attorney General.
GEORGE MORRIS FAY,
United States Attorney.

133 *Appendix I*

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 25th day of July A. D. 1947

No. 29117

UNITED STATES OF AMERICA v. ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL.

It appearing, That on August 3, 1945, the Commission, by division 2, made and filed its report and entered its order in the above-entitled proceeding; that on May 3, 1946, the Commission made and filed its report on reconsideration and entered its order in said proceeding, and that at a later date the Commission reopened the proceeding for reargument and reconsideration;

It further appearing, That reargument has been heard, and the Commission on the date hereof, has made and filed its report containing its findings of fact and conclusions thereon, which said report, and reports of August 3, 1945, and May 3, 1946, are hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding, be, and it is hereby, dismissed.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary*.

134 *Appendix II*

INTERSTATE COMMERCE COMMISSION

No. 29117

UNITED STATES OF AMERICA v. ABERDEEN & ROCKFISH RAILROAD COMPANY ET AL.

Submitted April 5, 1945. Decided August 3, 1945.

Defendants' failure to make complainant an allowance for wharfage and handling incident to shipside receipt and delivery of its export, import, coastwise, and intercoastal freight at Army Base Piers 1 and 2, Norfolk, Va., or to furnish wharfage and perform the handling service themselves, found to have been and to be an unjust and unreasonable practice, and to result in unjust discrimination in violation of sections 1 and 2 of the Interstate Commerce Act. Defendants ordered to cease and desist from such violations, and reparation awarded.

Francis M. Shea, Donald B. MacGuineas, Major Edward H. Cox, and *First Lieutenant E. F. Huber* for complainant.

Windsor F. Cousins, Anthony P. Donadio, Harold H. McLean, Charles P. Reynolds, A. J. Dixon, John C. Donnelly, D. Lynch Younger, Lawrence Chaffee, R. D. Brooks, and *C. H. Ware* for defendants.

Powell G. O'Neil for State Corporation Commission of Virginia, intervenor.

H. J. Wagner, Charles R. Seal, Samuel H. Williams, Frederick E. Brown, Wilbur La Roe, Jr., Arthur L. Winn, Jr., F. J. D. MacKay, H. V. C. Wade, and *Edward K. Laux* for other intervenors.

135 13

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS SPLAWN, ROGERS, AND BARNARD

By Division 2:

The parties excepted to the examiner's proposed report, and the issues were argued orally. Our conclusions differ from those recommended by the examiner.

By complaint filed April 15, 1944, complainant, hereinafter also referred to as the Army, alleges in effect, that the defendant's refusal to make it an allowance for wharfage and for its cost of loading and unloading to and from cars, herein called handling, incident to shipside receipt and delivery of its export, import, coastwise, and intercoastal freight at Army Base Piers 1 and 2, Norfolk, Va., was and is an unjust and unreasonable practice and resulted and results in rates[1] that were and are unreasonable, unjustly discriminatory, and inapplicable. The Commission is asked to require the defendants for the future to perform the service or to pay the Army an allowance for its costs of wharfage and handling, or to state in its tariffs separately from its rates these wharfage and handling charges at Norfolk. The Army also requests reparation on past shipments handled by it over these piers.

The State Corporation Commisison of Virginia, the State Port Authority of Virginia, the Norfolk Port-Traffic Commission, the Richmond, Va., Chamber of Commerce, the Baltimore, Md., Association of Commerce, the Chamber of Commerce and Board of Trade of Philadelphia,
136 Pa., and the Port of New York Authority intervened. They are neutral except as hereinafter indicated.

For more than 50 years it has been the general practice of railroads serving north Atlantic ports, including Norfolk, to load from pier to car and unload from car to pier water-borne freight which they move by rail to and from those ports. The practice is limited by tariff provision to specified types of traffic, and, while it originated on traffic handled at railroad-operated piers, it has been extended to public piers operated by steamship companies, municipalities, pier companies, or individuals.

The practice of railroads serving south Atlantic and Gulf ports differs somewhat. Their port charges are generally published separately from the line-haul rates, *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663, 680, but they absorb such charges, subject to tariff limitation. Where their rates between Norfolk and points in the South, plus the wharfage and handling charges at that point, exceed the rail-water rates to or from Baltimore, Md., the latter are applied as maxima to or from Norfolk.

[1] Rates and charges unless otherwise indicated will be stated in this report in amounts per 100 pounds, and are those applicable on classes of freight just described.

Some of the railroads serving the port of Norfolk do not own public piers where they may interchange freight moving by water to or from that port with water carriers, but they provide them under contracts with terminal operators acting as their agents to furnish wharfage, or pier facilities for the use of the railroads, and perform handling of freight consigned from and to those facilities. The rates of the railroads for transportation to and from Norfolk generally include or their tariffs provide for absorption of the charges of the pier operators for wharfage and handling at their respective terminals. The names of these terminals
are set forth in the tariff of the Norfolk and Ports-
137 mouth Belt Line Railroad Company, herein called the Belt. It is owned equally by eight line-haul carriers reaching the port of Norfolk and performs terminal services for them in the Norfolk port area, including switching to and from the pier terminals just described. In 1925 the Pennsylvania, having no pier facility in Norfolk, and desiring to provide service for shippers and to secure an agent for solicitation of water-borne traffic over its lines, entered into a contract with Norfolk Tidewater Terminal, then operating the Army Base as a public pier facility, to act as such agent. The stipulated compensation to it for such service, which was termed compensation for wharfage, was 20 cents per ton of freight moving over the pier. This carrier also employed this terminal operator to load freight to and from cars for compensation of 60 cents per ton.

The Belt publishes in its tariff charges of 1 cent for wharfage and 3 cents for handling general freight. The official territory lines serving the port, except the Chesapeake & Ohio provide in their tariffs that the aforesaid charges of the Belt will be included in the freight rate to or from Norfolk thus effecting, in substance, an absorption of those charges. The tariffs of other individual lines which use their own or leased pier facilities at Norfolk likewise generally provide for absorption of such charges as published by the Belt or the inclusion in their rates to or from Norfolk of wharfage and handling at their own terminals or the absorption of the charges of their agents, the pier operators, for similar services, not to exceed the amounts above stated.

The provision in the contracts referred to for absorbing the wharfage and handling charges of the terminal, excludes traffic owned by the terminal operator, but in the tariffs providing for such absorption there is no exception as to traffic owned by the shipper.

138 With the rapid increase of its military forces overseas it became necessary in 1942 for the Federal Government to use all Atlantic coast deepwater terminals to supply its troops. As a result the Hampton Roads Port of Embarkation was established on June 15, 1942. It embraced several port facilities in the Norfolk area, including the Army Base piers and was one of the largest ports, in volume of freight shipped, used by the Army at the time of the hearing. Other east coast ports such as Baltimore, Md. and Philadelphia, Pa., also served as cargo ports of embarkation.

Complainant owns Army Base piers 1 and 2 which were built on its waterfront tract, developed as the Army Base. The piers were completed soon after World War I and for over 20 years have been one of the principal public pier facilities in Norfolk for the handling of general import, export, and coastwise traffic interchanged with the railroads serving the port. Soon after completion they were leased to the city of Norfolk which operated them as municipal terminals until September 1, 1925. Norfolk Tidewater Terminals, Inc. then leased the facilities and operated them until July 1, 1940. From that date to and including June 14, 1942, the piers were leased to and operated by Transport Trading and Terminal Corporation.

The Army Base piers consist of 2 converted concrete piers each about 1,200 feet long, at which 8 modern cargo vessels can be docked and worked simultaneously. There are sunken tracks extending down the center of each pier and there are also marginal tracks on wide aprons on both sides of each pier. One side of each pier is equipped with heavy lift cranes and the inshore ends are connected by concrete roadways with warehouses farther inland. The

Army Base property extends inland from the piers
139 about 2 miles to the Virginia Railway, and includes a storage yard about a mile from the piers, accommodating about 500 cars.

The only other facilities for the handling of general export and import cargo in the Norfolk harbor are the two Lambert Point piers of the Norfolk & Western Railway Company; one 1,200 feet long, with single marginal track on one side and a depressed track down the center, and the other about 850 feet long, with a marginal track on one side and no berthing facilities on the other, and Pinners Point pier 4 of the Southern Railway Company at Portsmouth, a wooden structure not over 900 feet long. It has a rather narrow apron, depressed tracks down the center, marginal

track on one side, and depth of water on the other that does not permit loading of modern cargo vessels. There is no mechanical equipment at these piers.

Of the volume of traffic which moved over the Army Base piers in 1943, aggregating hundreds of thousands of tons per month, about 37 percent could have been handled over the piers just described if the Army Base piers had not been available. That volume[2] was estimated at about 10 times the average peacetime tonnage handled over the Army Base piers. The flow of this traffic to the ports was regulated by the Office of Defense Transportation under permit and the handling operations were continuous. Section 6 (8) of the act provides, among other things, that in time of war carriers shall adopt every means within their control to facilitate and expedite military traffic.

The Army has leased a pier of the Norfolk & Western at Sewall Point, about a mile north of the Army Base piers and known as the United Nations Depot. It is used for "lend-lease" traffic and as an Air Corps "in-transit" depot. There the Army has hired the Lincoln Tidewater Terminal, Incorporated, to do the handling on a cost-plus-a-service-fee basis. Under certain contracts the defendants pay this pier operator, except on Army traffic which is handled by the Army chiefly with soldier labor, a wharfage and handling charge of about 4 cents. The payments are turned over to the Army since the Army pays the pier operator for the use of the facilities and the handling. The method of loading and unloading at this pier, the Lambert Point piers and the Army Base piers is the same. At the Lambert Point piers, where an allowance is made, the car unloading is done by civilians and in certain cases by military personnel.

The Army also operates piers owned by defendant, Chesapeake & Ohio at Newport News, Va., using that company's labor, its pier superintendent, and other supervisory employees under a contract, defendant paying it an allowance of 50 cents a ton for handling. No wharfage is involved as defendant maintains the piers without expense to the Government. Commercial freight may move over these piers by consent of the Army, and the Chesapeake & Ohio performs the handling thereof. At Baltimore the carriers handle the Army's carload freight. They also pay

[2] Much of this was transferred directly from open top equipment, and no handling of the nature herein described was involved.

the Army an allowance on certain less-than-carload freight that requires and is accorded special handling by the Army on railroad piers. They pay handling allowances to the Army at Boston, Mass. The allowances here mentioned are made under section 22 of the Interstate Commerce Act, which provides that the carriers may transport, store, or handle property for the Federal Government free or at reduced rates.

The Belt operates over the line of the Virginian Railway Company in reaching the Army Base. Cars
141 which it receives from the line-haul carriers are classified in a yard adjacent to the Army Base and when ordered by the Army are hauled to the base in trainloads and placed on tracks in the storage yard or other tracks near the north gate immediately inside the base as designated by the Army. After this placement, yardmasters in the base yard, under supervision of the Army, issue instructions for switching cars between that yard and the piers and for placing them on and removing them from the piers. This is done with motive power and crews supplied in part by the Belt and in part by the Army but working in a pool under Army supervision and control.

During the period when the railroads employed the agents above named to operate the Army Base pier facilities, it was the practice of defendants to place boxcars for loading or unloading at points on the piers adjacent to the berth at which the steamer docked, and for the pier operators to load and unload the freight from or to points on the pier, generally referred to as the ship's loading berth. The Belt switched cars to and from the piers, except that prior to 1940 one operator used its own locomotive for most of such switching.

The handling of the freight between cars and pier floor prior to June 15, 1942, was performed by the pier operator with civilian labor. On that date the Army took over the piers, but there was no change in this loading and unloading operation. The Army, utilizing the existing organization, performed the service with the same civilian employees, under the same supervisory force, and did the work, at its own expense and in the same manner as the terminal operator. Gradually, as additional labor to handle the greater
volume was required, troops were used to assist in
142 the unloading operations. At the time of the hearing, they represented about one-half of the total force employed for that purpose. If the Army had not taken its property, the terminal company, with proper

organization, could have continued the operation. The commanding general of the port testified, however, that unified control, and Army supervision and coordination of the car unloading with the allocation of ships would have been necessary. Whether such operation could have been conducted without the aid of military personnel to augment the labor force is not clear from the record. An operating manager of the terminal company who continued in a similar capacity in the employ of the Army testified that it could not. There is also testimony to the effect that sufficient additional civilian labor could be obtained to do the work, and that the Army would not object thereto. There is no evidence that coordination of activities on the piers was not accomplished effectively or that the services of defendants' agent were unsatisfactory to the Army prior to the date it assumed control. Nor is there evidence from which we may conclude that performance of the handling services by defendants on and after June 15, 1942, would have been or is incompatible with such supervision and coordination by the Army as it deemed necessary. Since that date, the services were performed by the Army, but defendants have charged and complainant has paid the same rates as it did prior thereto on all of its water-borne freight which moved over the Army Base piers. No allowance or any deduction for wharfage and handling has been made to complainant.

The Army allows the piers to be used for commercial bulk freight when that traffic can be handled without interfering with the movement of military freight. Shippers of commercial freight make their own arrangements
143 with the Army. Complainant asks that it be reimbursed for wharfage and handling which it performed on such traffic, aggregating about 700 carloads since 1942, and for which it has received no payment from defendants. As this traffic was not the property of complainant, and in the absence of a showing that it was the duly authorized agent of the owners thereof, no allowance with respect thereto can be paid to complainant under section 15 (13) of the act, and no other authority for such payment has been shown. *United Chem. & Org. Products Co.* v. *Director General*, 60 I. C. C. 523.

There is no evidence that defendants at any time after June 15, 1942, offered to continue handling of the freight at these piers, nor that the officers in charge of the piers did or would refuse to allow that service to be performed

by defendants, had they so offered. If the carriers were willing to perform the handling, the commanding officer would permit them to do so with the same civilian force as used by the Army, subject to screening of such employees and the Army's fire, safety, and sanitary regulations, and with the right to supplement such forces, when inadequate, by troops.

Soon after the Army took over the Army Base and undertook the handling of its freight, it made several written requests of the defendants to pay it an allowance therefor. In making these requests it pointed out that during the period when the piers were leased from the Government and operated by the terminal corporation for defendants, the latter had compensated that operator for wharfage and handling services which it performed, but that when the Government canceled the lease and took over the piers, defendants' terminal tariffs were not amended to authorize payment of the compensation to the Government, the same as formerly allowed the private operator. The re-
144 quests were refused by defendants on the ground that where control or operation of piers or other facilities is taken over by the Government for its own use or they are operated under contract with the Government and under Government supervision, such facilities should be treated the same as piers operated or controlled by the owners of the property transported, and loading and unloading should not be performed by the carriers, nor any allowance made in lieu thereof. This, in substance, is still the position of defendants, their contention being that the Army is a private pier operator like any private shipper who decides to operate his own pier for the advantages and convenience of his own business.

On May 22, 1943, the Army made written request of all defendants serving Norfolk to perform the handling service, to the extent that it had for many years been included in the line-haul rates. Defendants declined to perform the service on the same grounds on which they had refused the allowances, i. e., that the railroads at north Atlantic ports generally do not hold themselves out to handle waterborne freight on private piers or piers controlled by the owners of the traffic.

Defendants say they have no desire to penalize the Government and that its freight has always had the advantage accorded freight of other shippers, but that they are apprehensive that the granting of the request would destroy the principle which has served to restrict this port practice to

the purposes under which it arose and to hold the practice within reasonable limits; and that the absorption would be in effect at the Army Base today on Government freight if the Army had not taken over the facility to obtain the advantages of control over its own freight.

The principal defense for the failure and refusal to provide the services, as had been done prior to June
145 15, 1942, or to make an allowance in lieu thereof, is that beginning on that date the piers were used to such an extent for military purposes in handling freight owned by complainant that they could no longer be regarded as public piers open for commercial traffic.

In *Elimination of New York, N. H. & H. R. Pier Stations*, 255 I. C. C. 305, the respondent carrier proposed, by eliminating certain piers at Boston and Providence, R. I., including one owned and operated by the War Department and another leased and used by the Navy Department, as stations on its line, to relieve itself of its stated responsibility for the expense of loading and unloading freight interchanged with water carriers. The justification advanced for such action, similar to that in the instant proceeding, was that the piers were used to such an extent for military purposes that they no longer could be regarded as public piers open for general commercial traffic. Division 2 said:

> Respondent treated these piers for many years as some of its principal port facilities at which commercial shipments were loaded and unloaded, that service being included in the line-haul rates. We are of the opinion that the circumstances upon which it now relies as justification for discontinuance of that service do not warrant the conclusion that the piers in question should at this time be treated as private piers.

The traffic there affected was commercial traffic, but the principle followed was that where, for many years, the service had been included in the line-haul rates and the evidence showed that it was continued, or the cost thereof absorbed when the service was performed for respondent at other piers, it was respondent's duty to continue to include the service in the line-haul rates. The piers
146 at Providence, like the Army base piers at Norfolk, were under the control of the War Department.

The record shows that control by the Army of the piers at Norfolk for its purposes was not and is not incompatible with continued performance by defendants of the loading and unloading services at those piers. Complainant has proved that except for the greater volume of tonnage, for

the switching of which it supplied additional power and crews, there was no change in the manner of moving the cars to or from the piers; that as to a part of the traffic, the Belt, under Army supervision, continued to use its switching power and crews for that purpose and that the methods of unloading and loading remained the same.

For many years defendants used these piers as important port facilities at which they or their agents, the successive pier operators, loaded and unloaded commercial shipments and, at least in recent years, also freight for the Army, that service and wharfage being included in the line-haul rates. Defendants, in disclaiming responsibility for continuing to so include them or make them an allowance therefor to complainant, rely upon *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463. There division 4 found that defendants' refusal to perform the services incident to transfer of forest products and general traffic between ships and railroad cars at Port Newark, N. J., at piers operated by complainant's wholly owned subsidiary and used by vessels of the Weyerhaeuser Steamship Company, when defendants held themselves out generally to perform such service only at their own or other piers operated as public piers, was not unreasonable, unjustly discriminatory, or unduly prejudicial. To reach complainant's piers it was necessary for defendants
147 to operate over tracks of a third party, the city of Newark, and in performing the transfer service they would have been subjected to a charge by the city of 50 cents per ton for the use of those tracks. The city made no charge for use of its tracks in reaching the public piers. The division accordingly found that the conditions under which the transfer services would be performed at the facility used by complainant were dissimilar from those at public piers. No such dissimilarity was or is present here. The reasons there given for defendants' policy of performing the transfer services only at railroad or public piers and not at piers controlled by owners of the freight were "the difficulty of policing the practice, the necessity of performing the handling at the rail carriers' own convenience, the economy resulting from the concentration over a limited number of piers, and the conservation of revenue." The division, in considering these, said:

> For example, freight coming into the possession of the owner is regarded as domesticated and is not entitled to the privileges accorded water-borne freight.

Ordinarily carriers cannot handle freight over private piers at their convenience and economical handling cannot be achieved if freight is widely dispersed over many piers. Defendants are fearful that if they are required to perform the transfer services at the piers of Atlantic Terminals, Incorporated, such action will result in extension of the practice beyond reasonable bounds. They show that there are numerous companies at Pork Newark and other ports with private facilities along the water front which, by the formation of a pier company or public terminal, would be in a position to demand the performance of the transfer service. At the time of the hearing a new terminal company had been formed to operate on the prop-
148 erty of a large shipper at Port Newark and had sought an extension of railroad services at its piers.

We find little, if any, resemblance in the situation at the Army Base to that in the case relied upon. Prior to June 15, 1942, the freight, similar to that to which the controversy here relates was not regarded as domesticated. Nor was it so treated, insofar as the application of rates thereon was concerned, on and after that date. Neither the increased volume of the traffic, nor the fact that military requirements made it imperative that the handling be expedited may be regarded as circumstance sufficient to relieve defendants of their obligation. They no doubt necessitated additional service and supervision, but it does not follow that it would have been impracticable for defendants to perform the handling at their convenience after the Army took possession of the piers. The handling of such a large volume of freight as was concentrated at complainant's Army Base facility would have involved no wide dispersion and is to be presumed as conducive of maximum economy. In no sense could it be regarded as an "extension of the practice beyond reasonable bounds." It is inconceivable that complainant would reap any competitive advantage such as a commercial enterprise would obtain from such extension of a service to it and not made available to other shippers. The record shows that the Army took over the piers only because of military necessity. When defendants had been requested to perform the service, we conclude that it was their duty to do so within a reasonable time thereafter, not later than July 1, 1943.

Prior to June 15, 1942, and for extended periods thereafter, several of the defendants' tariffs provided that wharfage and handling at wharves of the Transport Trading and Terminal Corporations[3] at Norfolk would be included in the transportation under rates to or from that point. But on and after that date, when these tariffs did not name the Army Base piers as such, defendants contend that they contained no absorption provisions applicable to those piers. We do not accept that view. The record is convincing that defendants' practice in designating pier facilities in the tariffs was to indicate them as points, and that they generally used the words "at" and "through" in referring to them, notwithstanding that some of the Norfolk facilities were identified only by the name of some company, which was then or had previously been operating those facilities. For periods ranging from a few months to 10 years from September 1925, when Norfolk Tidewater Terminals, Inc., operated the Army Base piers, they continued to be designated in the port tariffs of the several Norfolk lines as municipal terminals, just as they had been identified when the city of Norfolk had operated them. We conclude that at all times on and after June 15, 1942, when reference to Transport Trading and Terminal Corporation was made in defendants' terminal tariffs, that such reference identified the particular piers or wharves herein referred to as the Army Base piers, and that the services of wharfage and handling at those piers during those times were included in the applicable rates to and from Norfolk and were specified services which defendants held themselves out to perform under those rates. The failure to perform them or make a reasonable allowance to complainant in lieu thereof, during the periods when they were included in the rates which defendants exacted covering those services, was an unreasonable practice. *Borden's Farm Products Co.* v. *New York, N. H. & H. R. Co.*, 92 I. C. C. 270, 102 I. C. C. 497. The act contemplates that if a carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he sall pay for them. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46.

149

150

The officer who supervised the accounting and auditing operations for complainant at the port submitted a compu-

[3] Also referred to in some tariffs as "Transport Trading & Terminal Corporation" or "Transport Trading and Terminal Corp."

tation of the actual direct cost of unloading all cars unloaded by civilian labor to the pier platform during a 31-day period in 1944, which he considered representative of the period of Army operation. This cost related to about 29,000 tons and was 4.6 cents per 100 pounds. It included the direct cost of the labor at an hourly rate of 64 cents and the supervision by checkers of the laborers at a rate of 95 cents. No element of cost involved in wharfage was included. The cost to defendants if they had absorbed the charges of the terminal operators for similar service would have been 3 cents plus 1 cent for wharfage. Complainant seeks reparation at these rates, which were the customary basis of charge of the terminal operators. We are of the opinion that these rates were and are reasonable bases of compensation for wharfage and handling performed by complainant.

The alternative relief sought by complainant, i. e., that the wharfage and handling charges be deducted and state separately from the rates in defendants' tariffs, is opposed by the north Atlantic port interests, interveners herein, on the ground that it would disrupt the long-standing rate relations among the various competing ports. In *Wharfage Charges at Atlantic and Gulf Ports, supra*, the Commission refused to require separate statement of port ter-
151 minal charges at Norfolk and other ports. In view of the conclusions herein, no further consideration need be given this matter.

We find that defendants' failure at all times on and after June 15, 1942, when their tariffs contained reference to pier facilities identified as Transport Trading and Terminal Corporation, and their failure and refusal on and after July 1, 1943, to furnish wharfage and perform handling services or to make a reasonable allowance to complainant in lieu thereof, in connection with traffic of complainant handled over the Army Base piers at Norfolk of the same general kind and character as that which had moved over those piers immediately prior to June 15, 1942, and in respect of which wharfage and handling services were included in the rates to and from that port, was, is, and for the future will be an unreasonable practice in violation of section 1 (6) of the Interstate Commerce Act; that defendants' failure and refusal to furnish wharfage and perform handling in connection with complainant's traffic or to make an allowance to complainant in lieu thereof, while contemporaneously furnishing and performing them

in connection with like traffic of other shippers moving through Norfolk, is and for the future will be unjustly discriminatory in violation of section 2 of the act; that complainant furnished wharfage and performed such handling service during the periods as described; and that it has been damaged thereby to the extent of the reasonable cost to it of furnishing such wharfage and performing such handling, which we find to have been 4 cents per 100 pounds, with interest. Complainant should comply with rule 100 of the General Rules of Practice, and it may include a statement on form No. 5 of shipments handled by it during the pendency of these proceedings, accompanied by proof in
152 affidavit form of particular cars in respect of which services were performed. If defendants object to this method of proof a further hearing may be requested.

An order for the future will be entered.

BARNARD, *Commissioner*, dissenting:

I disagree with the majority and believe that the complaint in this proceeding should be dismissed. The evidence indicates that the rates were and are less than reasonable maximum and that the 4-cent allowance approved by the majority will make them just that much below the upper limit of reasonableness. Practically all of the assailed rates are less than the domestic rates. The assailed rates are generally the same as rates to and from Baltimore, Md., although the distances to and from Norfolk generally are greater. For example, from 106 points in official territory, the average distances to Baltimore are 690 miles, whereas to Norfolk the distances from such origins are 838 miles.

Furnishing the wharf and handling the freight at the Army piers are not transportation, but merely facilities provided and work done by a shipper for itself on its own property at its own convenience, before and after the transportation is performed. Defendants may not, therefore, be required to provide a wharf or handle the freight on the Army piers, and not being required to do so, they are not compelled to pay an allowance in lieu thereof. *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11.

153 *Appendix III*

INTERSTATE COMMERCE COMMISSION

No. 29117

UNITED STATES OF AMERICA

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY ET AL.

Submitted April 3, 1946. Decided May 3, 1946.

On reconsideration, finding in prior report, 263 I. C. C. 303, that the defendants' failure to make the complainant an allowance for wharfage and handling incident to shipside receipt and delivery of its export, import, coastwise, and intercoastal freight at Army Base Piers 1 and 2, Norfolk, Va., or to furnish wharfage and perform the handling service themselves, was an unjust and unreasonable practice and resulted in unjust discrimination in violations of sections 1 and 2 of the Interstate Commerce Act, reversed. Complaint dismissed.

Additional appearances: *John F. Sonnett* for complainant. *B. F. Brooks, amicus curiae.*

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the prior report, 263 I. C. C. 303, division 2 found that the defendants' failure to make the complainant an allowance for wharfage and handling incident to shipside receipt and delivery of its export, import, coastwise, and intercoastal freight at Army Base Piers 1 and 2, Norfolk, Va., or to furnish wharfage and perform the handling service themselves was an unjust and unreasonable practice and resulted in unjust discrimination, in violation of
154 sections 1 and 2 of the Interstate Commerce Act. The defendants were ordered to cease and desist from those violations, and reparation was awarded. On petitions of certain of the defendants the proceeding was reopened for reargument and reconsideration, and the effective date of the order entered by division 2 was postponed indefinitely pending final disposition of the matter. We also gave Benjamin F. Brooks, a practitioner, permission to file a petition for intervention and supporting brief as *amicus curiae* giving at the same time, all the parties an opportunity to reply thereto. In the beginning this intervener was not a party to the proceeding, and he does not represent any particular interests. His views with respect

to the controversy will be discussed hereinafter. In addition to intervener Brooks, counsel for the complainant, the petitioning defendants, and the several chambers of commerce and port authorities referred to in the prior report participated in the oral argument. Facts stated in the prior report will be restated if deemed necessary.

There have long been piers at Norfolk which have been used for water-borne traffic shipped to and from that port. Two of them, known as Army Base Piers Nos. 1 and 2, were built by the complainant. They were completed shortly after World War 1, and leased to private interests for commercial peacetime operation as public terminal facilities of the railroads. For several years prior to 1942 they were operated by the Transport Trading and Terminal Corporation as a public wharfinger and as an agent of the defendants. By contract that corporation agreed to unload out-bound traffic from the cars to the pier floor and to load in-bound traffic from the pier floor to the cars whenever the defendants were obligated to perform that service. The defendants agreed to pay the terminal corporation a wharfage charge of 1 cent per 100 pounds and a handling charge of 3 cents per 100 pounds on all traffic so handled. The contract imposed duties upon that corporation with respect to that service; protected the defendants in the matter of collection of freight charges, improper delivery, and loss and damage claims, and gave the defendants the right to police and verify the operations of the terminal corporation. The latter also was required to give bond to protect the defendants against its failure to perform its duties. The defendants' tariffs provided for the absorption of these wharfage and handling charges, and for information with respect thereto those tariffs referred to the tariff of the defendant Norfolk and Portsmouth Belt Line Railroad Company, termed hereinafter for convenience the Belt Line. These tariffs did not name, as such, the afore-mentioned piers Nos. 1 and 2 as facilities where the carriers would perform the unloading and loading of cars, but described them as facilities of the Transport Trading and Terminal Corporation.

155

On June 15, 1942, owing to war conditions, the complainant deemed it necessary to cancel the outstanding lease, take over these two piers, and operate them for the movement of military freight, almost entirely out-bound. Thus the Transport Trading and Terminal Corporation no longer had possession of the two piers and could not continue its

services in the manner that it had done formerly. Apparently through oversight some of the tariffs of the defendants continued for a while to refer thereafter to the absorption of the charges for wharfage and handling at those two piers, but, of course, in the circumstances no such facilities or services were provided by the defendants, and in effect the tariff provisions were meaningless be-
156 cause the Transport Trading and Terminal Corporation no longer had any facilities at Norfolk. Some of the tariffs still remain unchanged in this respect.

The Belt Line has a classification yard at Berkley, Va., across the river from Norfolk. Although the record is meager and not clear in this particular, apparently prior to June 15, 1942, the Belt Line hauled cars containing outbound water freight from this classification yard to the piers, and similarly cars containing in-bound traffic were hauled from the piers to the Berkley yard. Adjacent to the two piers and included in the Army Base property there is a storage yard of about 500 cars capacity. Since the complainant took over the operation of the two piers the Belt Line delivers and receives respectively, cars of outbound and in-bound water traffic at this storage yard on tracks designated by the complainant before placement.[1] The complainant thereupon takes possession of the shipments and controls the movement of the cars beyond to the pier locations. It operates several locomotives of its own with its own crews. In addition the Belt Line contributes a locomotive and two crews, switching and reswitching the cars between the points where the complainant takes over the cars and the piers, and on the piers; all at the direction of the complainant's yardmasters. The unloading and loading of the cars, including the movement of the freight between the cars and the ships or between the pier floors and the ships, are being done by the complainant, generally in accordance with detailed plans prepared in advance for each ship, but subject to change, of course, in emer-
157 gencies. The freight has had to be handled according to priorities and the various changing conditions confronting the complainant. For example, ships that had been partially loaded or unloaded at times had to be moved away temporarily from the piers and out into the stream

[1] To some extent cars are also delivered through another connection, known as the north gate, to tracks immediately inside the Army Base. All empty cars are returned to the Belt Line through this north-gate connection.

to make room for emergency loading of other ships. Some cars had to be unloaded immediately upon placement on the piers, whereas others were held a short time or the freight therein unloaded and stored on the pier floors or in warehouses in the Army Base before being put aboard the vessel. Frequently, the complainant had to load vessels day and night to meet a convoy deadline hour based on over-sea calls. All activities on the piers had to be supervised and coordinated by a governing head. Since the complainant took over the two piers it has used its own personnel and at its own expense that of the previous pier operator, which did the handling. That is, the same men that did the work for the previous operator, have been doing it for the complainant. As labor shortages developed the complainant assigned Italian service units to this work and often used soldiers en route and sometimes stevedores to supplement regular civilian labor. At the time of the hearing in 1944, the civilian personnel on the piers was only about one-half of the total number employed.

At first, the complainant sought an allowance for this wharfage and handling, or, as an alternative, that the line-haul rates and the charges for that service be published separately in the tariffs, the rates to be reduced accordingly. Subsequently, the complainant indicated a willingness to have the defendants do the work and to let them have its civilian force, subject to observance of rules as to security, safety, fire, cleanliness, et cetera. The defendants could not have performed the service individually but
158 would have been obliged to pool their activities and operate as a unit under the complainant's control. In *Kingan & Co. Terminal Allowance*, 255 I. C. C. 531, 538, division 3 said that no duty devolves upon carriers to pool switching services in order to accommodate an industry when they could not individually perform the service with their own power at their own convenience and free from interference. And in *John Morrell & Co. Terminal Allowance*, 263 I. C. C. 69, 77, division 3 found that if it is not the duty of carriers individually to switch an industry, such an obligation cannot be created by the pooling of services. In the instant proceeding, the complainant recognized that the civilian force was inadequate and that the defendants could not get the additional manpower needed to handle peak loads. Troops would have had to be used, and obviously anything but operation by the complainant was impractical. We have been advised by the defendants that according to the public press Army officials on August 21,

1945, announced that the Army Base would be converted "back to virtually a civilian activity" and "will replace vacancies in Army ranks and prisoner of war labor with civilians."

By a special tariff provision the defendants' export rates apply on the complainant's shipments although the traffic is not export in the usual sense, as it passes into the possession of the complainant at points adjacent to the piers. The tariffs do not provide for absorption of wharfage and handling charges, or allowances for that service in lieu thereof on traffic moving under domestic rates. As applied to and from public commercial piers the rates of defendants The Pennsylvania Railroad Company, the Norfolk and Western Railway Company, and the Virginian Railway Company, but not the Chesapeake and Ohio Railway
159 Company or the southern lines,[*] generally include wharfage, that is, rent for the use of the piers which are not owned by the carriers but provided by them under contracts with the pier operators. Subject to exceptions, such as short-haul traffic, lumber, bulky articles, and freight in open cars and tank cars, these rates also include handling the freight for the defendants on the public commercial piers by the pier operators, but not by or for the owners of the property transported.

It is not the legal duty or practice of the carriers to perform handling services on carload freight except in unusual circumstances, such as livestock, or freight that is is to be transshipped by the railroads or their agents. Charges are added to the line-haul rates on traffic where wharfage and handling are not included in the published rates. The carriers provide wharfage and handling on traffic where it is in their custody for further movement and the shipper is not present to take possession and handle it. Shippers could not handle their freight without interfering with the carriers' operations on public commercial piers and railroad owned or operated piers. The amounts paid by the carriers out of the rates are the same as the published charges. The same arrangements applied at the two piers here under consideration when they were operated as public commercial piers, and similar arrangements as to handling are in effect at the other north Atlantic ports where the services are performed on public commercial piers by the

[*] The rates of the southern lines generally include wharfage and handling only where the Baltimore, Md., rate basis applies and where competition requires it; for instance, from points in Central Freight Association territory.

carriers or their agents not owners of the property transported. Since the complainant took over the operation of its two piers at Norfolk, however, thus furnishing its own wharfage and doing its own handling, there have been no arrangements there for wharfage or handling by or for the defendants, and they decline to pay the complainant an allowance therefor. The complainant contends that the defendants' actions in this respect render the rates relatively unreasonable, subjects it to unjust discrimination, and that the defendants have been following an unreasonable practice in not providing or paying for the wharfage and handling as alleged to have been held out by their tariffs.

In the prior report it was stated that "At the Lambert Point piers, where an allowance is made, the car unloading is done by civilians and in certain instances by military personnel." The petitioners call attention to the fact that the payment is compensation to a railroad agency having no interest in the freight.

The line-haul rates in question are less than reasonable maxima and nothing has been added to them to cover the cost of wharfage and handling. In other words, the carriers never have particularly considered wharfage and handling costs in making the rates. They have always left the matter of charging or not charging for those services to the railroads directly serving the ports. Their line-haul connections do not participate in the absorption or collection of these terminal charges. None of the Norfolk rates exceed the domestic rates; practically all of them are lower. They are generally the same as the rates to and from Baltimore, although movement to and from Norfolk generally entails longer hauls. For example, from 106 important points in central territory the average distances are 838 miles to Norfolk and 690 miles to Baltimore. On class-rate traffic the export and import rates from and to Norfolk are more than 9 percent less than the corresponding prescribed domestic rates.

The complainant asks that it be treated "exactly as commercial interests," and that it should "have the same rights and privileges that a private interest has." Section 2 of the act is to the effect that a carrier shall be deemed guilty of unjust discrimination if it receives from any person a greater or less compensation for any service rendered than it receives from any other person for doing him a like and contemporaneous service in the transportation of

a like kind of traffic under substantially similar circumstances and conditions. The defendants do not pay allowances to private shippers for wharfage or for handling export freight and do not perform the services on private piers. The freight of other shippers which receives the unloading service is not "like traffic," and if handled in the same manner as the complainant's freight the export rates would not be accorded it, much less the accessorial services. If anything, the complainant is being favored, but, of course, this is not unlawful under the circumstances. There is no showing that the defendants have failed to provide reasonable pier facilities, even assuming that they were legally bound to do so, which they deny, and rightfully so, citing section 6 (11) of the act, and *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663, 174 I. C. C. 263. Some of the defendants serving Norfolk have piers at which the complainant's feright could be handled. According to a witness for the complainant, however, the capacity of those piers was sufficient to handle only 37 percent of the traffic that moved over the complainant's 2 piers in 1943. During the height of the emergency the volume of traffic handled at these 2 piers is estimated at 10 times the
162 amount handled normally. The aforementioned railroad piers, therefore, would be able to handle 3.7 times that amount of normal shipments of the complainant.

This proceeding did not arise out of any foreseeable circumstances for which the defendants are responsible, but grew out of the necessities of a national emergency. The defendants did not hire the complainant to provide wharves or to perform the handling service, and the complainant may not require the defendants to hire it. "Whatever transportation services or facility the law requires the carriers to supply they have the right to furnish." *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199, 214. The complainant could have had its traffic handled at the defendants' expense if it had used the defendants' piers and had been willing to accept the service the defendants were able to provide. Railroads may limit their terminal services to particular piers if there is no unjust discrimination or undue prejudice. *McCormick Warehouse Co.* v. *Pennsylvania R. Co.*, 191 I. C. C. 727. They may not be required to operate on private property. *Winnsboro Granite Corp.* v. *Southern Ry. Co.*, 176 I. C. C. 481. The wharfage and handling at the defendants' public commercial piers are transportation provided by them for the shippers. Pro-

viding a wharf and handling the freight at the complainant's piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property at his own convenience and expense before or after the transportation is performed. The defendants may not be required, therefore, to provide a wharf or handle the freight on the complainant's piers, and not being required to do so they are not compelled to pay any allowance in lieu thereof. *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11. Moreover,

"When a carrier is prevented from performing the service by the election of the industry to perform it, and when the service of the carrier would not meet the needs and convenience of or be satisfactory to the industry, the carrier's duty to perform the service under the line-haul rate is discharged, and there is no obligation resting upon it to make an allowance to the industry for performing the service." Page 29 *ibid.*

The defendants distinguish between traffic moving over private and public or railroad owned piers, and cite *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463, 472, wherein division 4 said:

> Under the present tariffs the rail carriers undertake to load and unload water-borne freight only at railroad or public piers, but in no event at piers controlled by the owners of the freight. At Baltimore the services are performed only at railroad piers, at Camden, Wilmington, and Trenton only at municipal piers, at Philadelphia at either railroad or municipal piers or at privately owner piers which are operated as public piers, but in no case will the service be performed at piers controlled by the owner of the traffic. At Chester the services are performed at a railroad facility and at the pier of a warehousing company, which is operated as a public facility, but the services are not performed on freight in which the warehousing company or its owner has an interest. * * *
>
> The policy of defendants has been to restrict the port practices as much as possible, consistent with adequate service. Piers other than railroad piers are used only when necessary to supplement railroad facilities. In no case is the transfer service performed at a pier controlled by the owner of the traffic. The reasons for this policy are the difficulty of policing the practice, the necessity of performing the handling at the rail car-

164 riers' own convenience, the economy resulting from the concentration over a limited number of piers, and the conservation of revenue. For example, freight coming into the possession of the owner is regarded as domesticated and is not entitled to the privileges accorded water-borne freight. Ordinarily, carriers cannot handle freight over private piers at their convenience and economical handling cannot be achieved if freight is widely dispersed over many piers. Defendants are fearful that if they are required to perform the transfer services at the piers of Atlantic Terminals, Incorporated, such action will result in extension of the practice beyond reasonable bounds. They show that there are numerous companies at Port Newark and other ports with private facilities along the water front which, by the formation of a pier company or public terminal, would be in a position to demand the performance of the transfer service. At the time of the hearing, a new terminal company had been formed to operate on the property of a large shipper at Port Newark and had sought an extension of railroad services at its piers.

Division 4 found that the defendants' refusal to handle freight between the cars and ships at Port Newark, N. J., on the shipper's own pier while they performed that service on nearby public commercial piers on the same kind of traffic moving at the same rates was not unreasonable, unjustly discriminatory, or unduly prejudicial. The facts there are similar to those here.

The complainant emphasizes *Elimination of New York, N. H. & H. R. Pier Stations*, 255 I. C. C. 305. There the respondent railroad sought by a tariff amendment to relieve itself from responsibility for loading and unloading expense on carload freight interchanged with water carriers at certain piers at Boston and Providence, R. I.

165 Division 2 found that the schedules under suspension if permitted to become effective would create undue prejudice and that they were not shown to be just and reasonable. The facts there are not similar to those here. Division 2 stated, pages 307, 308:

> It will be noted that different methods of tariff procedure would be employed at Boston and Providence to bring about the proposed changes, but the intended effect is the same in each instance, namely, to relieve respondent of its present stated responsibility for the

expense of loading and unloading the described traffic, from and to the specified piers. Respondent's obligations and services on traffic to and from these piers are not affected in any other way. Line-haul rates to and from Boston and Providence, and switching charges, when applicable in connection therewith, would remain unchanged. Shipments which are handled direct from cars to vessel, or vice versa, are excepted from respondent's present loading and unloading service, and are not embraced in the issues herein.

* * * * *

If the schedules were permitted to go into effect, respondent's obligations with respect to switching of traffic to and from these piers would not be affected by the change. The piers would be shown as delivery points in the Boston switching district from and to which the line-haul rates would apply. Respondent would continue to come on these piers with its switch engines and crews and spot cars thereon, as heretofore. There is not contemplated the physical abandonment of any of the pier facilities.

The division continued by discussing the respondent's reasons for the proposed withdrawal of the loading and unloading services at those piers and stated
166 that the circumstances relied upon did not warrant the conclusion that the piers considered should at that time be treated as private piers. In the instant proceeding, when the complainant took over its two piers the defendants' method of handling the traffic was completely changed. No longer did it have supervision through its agent, the Transport Trading and Terminal Corporation, over the traffic passing over the piers. Instead, the complainant, as owners, took possession of the shipments in the hereinbefore discussed storage yard and north gate adjacent to the piers, and the movement of the cars and freight therefrom to shipside was completely under the control of the complainant. Moreover, in the proceeding referred to, the statute cast upon the respondents the burden to show that the proposed change was just and reasonable. Here the burden is upon the complainant to show that the law has been violated in the particulars alleged. The instant complaint does not contain an allegation of undue prejudice.

Intervenor Brooks favors the relief sought by the complainant, and argues that the wharfage and handling

charges should be published separately from the line-haul rates, the latter being reduced accordingly. Under that arrangement the commercial shipper would pay the reduced rates plus the separate charges, and, so far as the total amounts paid by him are concerned, the situation would not be changed. The complainant, which also favors this method of separate publication of the rates and terminal charges, however, would pay the reduced rates without the separate charges, and the effect would be the same as an allowance. We have the authority to require rates and charges to be published in this manner where and when the facts warrant. The intervening chambers of commerce and port authorities believe that if the wharf-
167 age and handling charges at Norfolk are published separately from the rates the same thing will happen elsewhere along the Atlantic and Gulf coasts and disrupt long-standing rate relations among the various competing ports, changing the flow of traffic to the detriment of one or the other. They are neutral with respect to the complainant's desire for an allowance, but they are interested in the continuance of single-factor rates to each port which include all services rendered by the carriers or their agents, thus preserving the port differential relations. This matter has had our consideration on numerous occasions in the past, and in *Lighterage Cases*, 203 I. C. C. 481, and *State of New Jersey* v. *Baltimore & O. R. Co.*, 245 I. C. C. 581, we refused to require terminal charges at Boston and New York City to be separated from the rates. Also in *Wharfage Charges at Atlantic and Gulf Ports*, *supra*, pages 678 and 692, after extensive investigation we refused to require port terminal charges at Norfolk and the other ports there under consideration to be published separately from the rates themselves.

Question may arise as to whether rates not including wharfage and handling should be prescribed for application solely to and from the complainant's two piers 4 cents per 100 pounds less than the rates that include wharfage and handling applying at other piers in Norfolk. It is sufficient to say that there is no showing that those rates would be reasonable maxima. In fact, the record is convincing that they are below that level.

Under date of January 24, 1946, the complainant filed a motion to dismiss the Norfolk & Western as a defendant in this proceeding inasmuch as those parties had reached an agreement with respect to the claim of the com-

168 plainant against that carrier. In view of our findings herein no action by us on this motion is necessary.

On reconsideration, we reverse the prior findings and now find that the defendants' refusal to make the complainant an allowance or to perform the services afore-mentioned or to state in their tariffs the wharfage and handling charges at Norfolk separately from their rates is not shown to have been or to be an unjust or unreasonable practice, or to have resulted or to result in unreasonable or inapplicable rates, or to have been or to be unjustly discriminatory to the complainant. The prior order entered in this proceeding will be vacated, and the complaint will be dismissed.

AITCHISON, *Commissioner*, dissenting:

I dissent for reasons stated by COMMISSIONER SPLAWN and ALLDREDGE.

SPLAWN, *Commissioner*, dissenting:

For more than 50 years the defendant carriers serving Norfolk and other north Atlantic ports have held themselves out in their tariffs applicable to traffic moving on shipside rates to and from those ports to absorb the cost of wharfage and the handling thereof between cars and pier floor.

Those defendants have, in practice, delivered the cars on piers owned and operated by them or their agents, local terminal companies. At Norfolk, under this arrangement, they paid the terminal operator of the Army base pier facilities 4 cents per 100 pounds for the use of wharves and its loading or unloading service.

During the war emergency it was necessary, in the public interest, for the Army to take over those facilities and to perform the work theretofore performed by the terminal company. The responsibility of the defendants
169 under their published tariffs was therefore discharged in substantially the same manner by the Army as theretofore by the terminal company. The issue here is whether the Army should receive the 4 cents for the facility it supplied and the work it has done in place of the terminal company, or whether the defendant railroads serving Norfolk shall be permitted to retain it.

The majority, reversing the division, finds in effect that defendants may keep the money. The facts of record afford no basis in law for such a result. It is conceded that defendants did not provide the facilities and services while holding themselves out to do so, but that is excused as an "oversight."

The conclusion reached is based on an unsound premise, *i. e.*, that the Army base piers constituted a private facility. All the pertinent facts point to the contrary.

Defendants distinguish between commercial freight handled by pier operators on public piers and that handled by private owners thereof when it moves over private piers, owned or leased by them. The Commission has recognized such a distinction when there was a sound basis in fact for doing so, as in *Weyerhaeuser Timber Co. v. Pennsylvania R. Co.*, 229 I. C. C. 463, the principal proceeding upon which defendants herein relied. But, as stated by division 2 in the original report, the facts here will not support such a distinction. The record discloses no similarity between the instant situation and that in the *Weyerhaeuser* case, either as to physical facts or as to the reasons there advanced in support of defendants' policy with respect to the practice of furnishing facilities and service at private piers. Complainant's piers were operated for many years as public piers and, as the record shows, they have been continued in operation as such,
commercial tonnage being handled thereover to the
170 extent that use of the piers by the Government, for
handling military traffic incident to the war, would permit. The defense of the port lines resting, as it does, on the attempt to distinguish complainant's pier facilities as private piers, lacks force.

The finding that complainant could have had its traffic handled at defendants' expense if it had used the defendants' piers is contrary to the evidence, which shows that only about 37 percent of the traffic which moved over complainant's piers in 1943 could have been handled over defendants' piers. In the light of such conditions one of the principal defendants has conceded the justness and reasonableness of complainant's claim to the extent recognized in the original findings and has made settlement accordingly.

From the foregoing it is apparent that the principles which underlie the findings in the so-called terminal allowance cases, invoked to support the report, are not in point here. The terminal carrier, the Belt Line, continued to perform spotting of the cars, switching them to and from the unloading points on the piers just as it long had been doing. Complainant unloaded them, for which service it seeks compensation. But no issue as to an allowance for the spotting is here presented. All that is involved is the failure of the port lines to provide the same full ser-

vice to which complainant was entitled under the shipside rates as defendants contemporaneously accorded shippers at other ports and at other public pier facilities at the port of Norfolk. The prior findings should be affirmed.

ALLDREDGE, *Commissioner*, dissenting:

Much of the discussion in the majority report seems to me to be irrelevant. Various rulings and doctrines are mentioned which may possibly be sound and correct
171 in the abstract, but so far as I can see they are not pertinent to the issues here presented.

Even if it be conceded that the ultimate findings in the prior report were in error insofar as they were predicated upon the theory that complainant was entitled to an allowance, the mistake was more of form than of substance. The final result, in my judgment, was correct.

The issue in this proceeding is, after all, a simple one. Prior to 1942 wharfage and handling between cars and ships at the particular piers involved were provided by private interests and the charges therefore, totalling 4 cents per 100 pounds, were absorbed by the defendants. This practice, together with other circumstances shown of record, establishes the fact that the line-haul rates of the defendants were made in contemplation of the absorption by them of these terminal charges. On June 15, 1942, the United States Army found it advisable or necessary, on account of the exigencies of war, to take over these terminal facilities and to perform the services; but defendants continued to exact the same line-haul rates that applied when they absorbed the charges of their terminal agent.

It is true that in publishing shipside rates at this and other ports the carriers have followed the practice of limiting their assumption of terminal costs to those instances in which they perform the services themselves or have them performed under their supervision. These restrictions have been upheld in many cases as lawful, but the validity of such restrictions rests more upon the necessity of policing the transactions in order to prevent violations of the law than upon any essential differences in the transportation services performed. Here the Government took over certain terminal facilities at which the car-
172 riers had heretofore absorbed these transfer charges and operated them itself. The traffic consisted of war materials, which moved in such large volume that it is doubtful if the carriers could have readily obtained the labor necessary to perform the services. But, be that as it may, the Government's intervention rendered it unneces-

sary for the carriers to supervise the transfer of the freight. Hence, it seems to me that the logical basis upon which the limitations of shipside rates have usually rested are entirely absent here. The final result of the majority decision is that the line-haul carriers have collected and retained compensation for services which they did not perform. The complaint should therefore be sustained.

COMMISSIONER ROGERS dissents.

173

Appendix IV

INTERSTATE COMMERCE COMMISSION

No. 29117

UNITED STATES OF AMERICA

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY *et al.*

Submitted November 6, 1946. Decided July 25, 1947

On reargument, finding in prior report on reconsideration, 264 I. C. C. 683, reversing finding in original report, 263 I. C. C. 303, that the defendants' failure to make the complainant an allowance for wharfage and handling incident to shipside receipt and delivery of the latter's export, import, coastwise, and intercoastal freight at Army Base Piers 1 and 2, Norfolk, Va., or to furnish wharfage and perform the handling service themselves was an unjust and unreasonable practice and resulted in unjust discrimination, in violation of sections 1 and 2 of the Interstate Commerce Act, affirmed. Complaint dismissed.

Appearances are shown in the prior reports.

REPORT OF THE COMMISSION ON REARGUMENT

BY THE COMMISSION:

In the prior report on reconsideration, 264 I. C. C. 683, we reversed the finding of division 2 in the original report, 263 I. C. C. 303, that the defendants' failure to make the complainant an allowance for wharfage and handling incident to shipside receipt and delivery of the complainant's export, import, coastwise, and intercoastal freight at Army Base Piers 1 and 2, Norfolk, Va., or to furnish wharfage and perform the handling service themselves was an

174. unjust and unreasonable practice and resulted in unjust discrimination, in violation of sections 1 and 2 of the Interstate Commerce Act. The complaint was dis-

missed. Upon further consideration of petitions of the complainant and Benjamin J. Brooks, *amicus curiae*, for reargument and reconsideration, we reopened the proceeding for reargument, which we have heard.

As more fully recited in the prior report on reconsideration, briefly stated the facts are that Army Base Piers 1 and 2 at Norfolk, owned by the complainant, were leased prior to June 15, 1942, to private interests for commercial peacetime operations as public terminal facilities of the railroads. From July 1, 1940, to June 15, 1942, these two piers were operated by the Transport Trading and Terminal Corporation as a public wharfinger and as agent of the defendants. That corporation unloaded the outbound traffic from the cars to the pier floor and loaded the inbound traffic from the pier floor to the cars at a charge of 4 cents per 100 pounds, consisting of 1 cent for wharfage [1] and 3 cents for handling, which charge the defendants serving Norfolk absorbed out of their line-haul rates. The Transport Trading and Terminal Corporation protected the defendants in the matter of collecting freight charges, and against improper delivery and loss and damage claims. The defendants reserved the right to police and verify the operations of the terminal corporation. Due to war conditions, on June 15, 1942, the complainant canceled its lease with the Transport Trading and Terminal Corporation, and took over the management and operation of these two piers for the movement of military freight, almost entirely outbound. Thus, the terminal corporation no longer had possession of the piers and could not continue its services in the manner it had done formerly.

It is neither the legal duty of the railroads to provide piers, which are essentially steamship facilities, nor to load or unload carload freight except in unusual circumstances, such as livestock, or freight that is to be transshipped by the railroads or their agents. When they obligate themselves to load or unload carload freight, the duty is established by tariff undertaking. In assuming that obligation with respect to export and import traffic, the carriers have restricted the practice to so-called public piers, that is, piers operated by railroads, steamship companies, or public wharfingers, and have excluded the so-called private piers, that is, piers operated by the owners of the freight. See *Weyerhaeuser Timber Co. v. Pennsylvania R. Co.*, 229 I. C. C. 463.

[1] Wharfage is a charge for use of the piers.

One of the questions here presented is whether the defendants, when they refused, subsequent to June 15, 1942, to pay the complaint an allowance for wharfage and handling at Army Base Piers 1 and 2, or, in the alternative, to perform the handling service themselves, violated section 6 of the act, which provides in effect that the carriers shall not depart from the requirements of their published tariffs. The name of the Transport Trading and Terminal Corporation, as a terminal operator at Norfolk as to wharfage, handling, and terminal services being included in the line-haul rates and allowances therefor, was not immediately canceled from the tariffs when the complainant assumed the operation of these two piers on June 15, 1942. The reference in the tariffs in some instances was to the "terminals" and in other instances to
the "facilities" of the Transport Trading and Ter-
176 minal Corporation, but no mention was made in those tariffs to Army Base Piers 1 and 2 by that name. In order to sustain the complainant's contention, therefore, it would be necessary to read into the tariffs words which were not there.

In its petition for reargument the complainant refers to Agent Hokes' tariffs I. C. C. Nos. 712 and 903, as providing for the absorption of terminal charges generally without designation of particular terminals or operators. The export rates in those two tariffs apply only "On traffic which does not leave the possession of the inland carrier until delivered to the ocean carrier or its agent * * *." Subsequent to June 15, 1942, this provision would have prevented the application of the export rates on freight handled through the Army Base, because that traffic "would leave the possession of the inland carrier" when delivered to the complainant, therefore, the defendants included a provision in the tariffs to the effect that the export rates would apply also on shipments consigned to the United States Government and handled through Navy Bases, Navy Yards, or Army Bases for export to foreign countries. By reason of this provision the carriers apply the export rates on traffic moving over the Army Base Piers 1 and 2. There is nothing in the tariffs, however, that requires the defendants to pay the complainant an allowance for wharfage and handling traffic through the Army Base at Norfolk. The provision makes the export rates, but not the absorption arrangement, applicable. As the defendants rightly argue, the granting of one concession does not necessarily require another to the same party. The allegation of a section-6 violation is not sustained.

The Norfolk and Portsmouth Belt Line Railroad Company, owned by the line-haul carriers serving
177 Norfolk, performs terminal services for them there.

The complainant in its petition argues that there was no change in the manner of handling the cars to and from the piers before and after June 15, 1942. In the prior report on reconsideration, we stated that the record was meager and not clear with respect to the manner in which the cars were handled to and from the piers prior to June 15, 1942, but that since that date the cars were being hauled to and from the 500-car capacity storage yard adjacent to the two piers and included in the Army Base property. Disposition of this complaint, however, does not depend upon whether there has or has not been a change in the manner of handling the cars to and from the piers before and after June 15, 1942. Since that date the aforementioned belt line delivers and receives cars of out-bound and in-bound freight at the storage yard just referred to on tracks designated by the complainant before placement. To some extent cars are also delivered through a "north gate" to tracks inside the Army Base. At the storage yard and north gate the complainant takes possession of the cars and directs the movement thereof beyond to the pier locations. It operates several locomotives of its own with its own crews. There is in addition a belt-line locomotive and crew switching between the storage yard and the piers, and on the piers. All of this work is done at the direction of the complainant's yardmasters.

Activities on the piers during the war were at a maximum, and, as described in our prior report on reconsideration, there is no doubt that under the arrangement which became effective June 15, 1942, the defendants would not have been able to continue the work done formerly by the
178 Transport Trading and Terminal Corporation at their convenience and to the satisfaction of the complainant. In *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, 29, we said that "When a carrier is prevented from performing the service (car spotting for delivery) by the election of the industry to perform it, and when the services of the carrier would not meet the needs and convenience of or be satisfactory to the industry, the carrier's duty to perform the service under the line-haul rates is discharged, and there is no obligation resting upon it to make an allowance to the industry for performing the service." The complainant argues that this principle is not applicable to the instant proceeding as a different

factual situation exists. We believe that our pronouncement may well be applied here. Although after June 15, 1942, the Transport Trading and Terminal Corporation had no facilities or terminals at the Army Base, it was the defendants' duty, under their line-haul rates, to place properly the complainant's cars for loading and unloading, and in the circumstances they discharged that obligation when they placed the cars in the complainant's storage yard adjacent to the piers.

With respect to the allegation of unjust discrimination, the complainant asks to be treated the same as commercial or private interests. The defendants argue that when these two piers were taken over by the complainant on June 15, 1942, they became private piers to all intent and purpose. The defendants do not pay allowances to private shippers for wharfage or for handling export freight, and they do not perform that service on private piers. As indicated, the defendants are not legally bound to provide pier facilities. *Wharfage Charges at Atlantic and Gulf*
179 *Ports*, 157 I. C. C. 663, 174 I. C. C. 263. Notwithstanding that, they do have pier facilities at Norfolk the capacity of which is sufficient to handle almost four times the amount of normal shipments of the complainant. During the war, however, the complainant's traffic increased tenfold. The freight of other shippers at Norfolk which receives unloading service is not the like kind of traffic contemplated by section 2 of the act dealing with unjust discrimination, and if handled in the same manner as the complainant's freight the export rates would not apply, much less the accessorial service demanded by the complainant or an allowance therefor.

There has been discussion in this proceeding with respect to the so-called unjust enrichment of the defendants in retaining the 4-cent allowance while the complainant performed the handling service and furnished the piers. It should be emphasized that the line-haul rates charged on this traffic were and are less than reasonable maxima, and that nothing has been added to them to cover the cost of wharfage and handling. For competitive reasons the defendants accord Norfolk the same export rates as Baltimore, Md., despite the substantially greater distances to Norfolk from important shipping origins. For example, the average distance from 106 representative points to Norfolk is 838 miles compared with 690 miles to Baltimore. Even to New York, N. Y., where the export rates exceed the Baltimore rate by 3 cents on the lower classes, the

distance is less than to Norfolk, i. e., 804 miles. A test of the export rates is provided by comparison with the domestic rates, as the latter (to Baltimore) form the foundation of the export rate structure, and themselves take
180 into account factors of distance and related matters.

The following table compiled from the record shows the sixth-class rates per 100 pounds to Norfolk:

From—	Domestic	Export
	Cents	*Cents*
St. Louis, Mo.	48	46
Chicago, Ill.	46	42
Fort Wayne, Ind.	43	37
Detroit, Mich.	42	34
Indianapolis, Ind.	42	39
Cincinnati, Ohio	39	35
Columbus, Ohio	37	32

In contrast with the foregoing, the domestic and export rates to Baltimore from these same origins are the same in every instance except from Detroit, where there is a 2-cent difference. In using the sixth-class rates for comparison, recognition should be given to the fact that the smallest difference between the export and domestic rates occurs in that class. When the rates from these same 106 points for all six classes are compared, the result is that the export rates to Baltimore average 99.5 percent of the domestic rates, whereas the same condition with respect to Norfolk shows 90.9 percent. At Philadelphia, Pa., and New York, where the differentials serve to increase the rates, the amounts are 96.2 and 94.3 percent, respectively.

As a result of the eastern class-rate revision in 1932, in which we prescribed rates on a distance basis, the long-established differential rate relations were destroyed on domestic traffic. In order to preserve the differential relations on import and export traffic, the carriers deemed it necessary to change the port rates because generally they were higher than the domestic rates prescribed in the aforementioned revision. This change was made by using the prescribed Baltimore domestic rates as a stand-
181 ard. With some few exceptions the Baltimore port rates became the same as the domestic rates, and port differentials were applied to the Baltimore rates. Philadelphia 1 cent over Baltimore, New York 3 cents over Baltimore, and, as in the past, the Norfolk carriers maintained the Baltimore basis despite the sharp difference in

the domestic rates. Just as the New York port rates, which formed the basis for the old adjustment, were made largely on the factor of distance, so the present Baltimore port rates, which now provide the basis for the whole adjustment, are governed by the same distance standard as the domestic rates. Thus, the level of the Baltimore port rates was not influenced by the local port practices at Baltimore, and the port relations are maintained without regard to the practices at the several ports. At New York the principal port privilege is free lighterage, but if free lighterage were abolished and a special charge provided for the service, the defendants do not believe it likely that the New York port rates would be correspondingly reduced, because that would result in rates to and from New York lower than to and from any other north Atlantic port and would upset the entire port relation. Thus it is clear that the level of the port rates does not reflect the additional services performed at the port. Although a wharfage charge at Norfolk heretofore has been absorbed by the carriers serving that port no similar payment to pier operators has been made at New York, Philadelphia, or Baltimore. This difference in practice has had no effect upon the rate level, the record showing that the level of the port rates does not depend upon the existence or nonexistence of certain port practices. The fact that the Baltimore port rates are the same as the prescribed domestic rates indicates that no factor has been included to
182 cover the extra cost of unloading and loading at Baltimore. From a large part of trunk-line territory export rates are identical with the domestic rates to the several ports. As stated in the prior report on reconsideration, service at the several ports is accorded by the carriers reaching the port without any participation in the cost by their interior rail connections. The cost of performance varies at the several ports and the privileges are not identical, yet this has had no effect on the rates.

Further, to show that the Norfolk export rates plus the additional charge for terminal services, such as wharfage and handling, do not exceed a maximum reasonable limit, the defendants refer to the fact that freight moving in open-top cars is not usually unloaded by them although subject to the same export rates; that certain commodities, such as lumber and heavy and bulky articles, are excluded from the privilege, although subject to the same export rates; and that considerable export freight is handled over

private piers at the several ports but is excluded from the free unloading privilege. No evidence was adduced by the complainant to show that the export rates to N[illegible]k, in and of themselves, were and are unreasonably high. The complainant's contention is that these rates are shipside rates and they are unreasonable because no allowance has been made to it for the wharfage and handling. It is well settled that there is nothing inherent in export traffic which entitles it to rates lower than those applied to domestic traffic, and as nothing has been added to the export rates here in issue to cover the wharfage and handling they are not above a reasonable maximum level when a reasonable charge for wharfage and handling is added. This being true, an order directing the defendants to pay the
183 complainant reparation in the amount of the aforementioned wharfage and handling charge would make the export rates just that much below the upper limit of reasonableness. During the argument we were advised by counsel for the complainant that efforts are being made to have these two piers operated in a manner similar to that in effect prior to June 15, 1942. So that the purpose of this proceeding now is for reparation only.

On reargument, we affirm our findings in the prior report on reconsideration. The complaint will be dismissed.

SPLAWN, *Commissioner*, dissenting:

The principal issues presented in this proceeding are whether defendants' tariffs provided that they would pay wharfage for the use of the Army's piers and handling charges for the loading and unloading of traffic moving at shipside rates over those piers; and whether it was a violation of sections 1, 2, 3 and/or 6 of the Interstate Commerce Act for defendants to refuse to furnish wharfage and perform handling services or to pay complainant for furnishing such facilities and performing such services when defendants collected the full shipside rates.

The report fails to correctly state important provisions of the tariffs; and the conclusion that in order to find the tariffs applicable "it would be necessary to read into the tariffs words which were not there" is fallacious. That question was dealt with in the prior reports by Division 2, but in view of the indicated misconception of the tariff provisions I quote part of Virginian Railway's tariff I. C. C. No. 2196, which is representative of the other line-haul tariffs:

At Lincoln Tidewater Terminals, Inc., Transport Trading and Terminals Corporation, or Southgate Terminal Corporation (Portsmouth Division Terminals),

184 Wharfage, handling and terminal charges, as published in Norfolk and Portsmouth Belt Line Railroad tariff No. 6—J, I. C. C. No. 105, will be included in the transportation rates applicable to or from Norfolk, Va., on the following traffic moving in connection with the Virginian Railway *through the above terminals*. [Italics supplied.]

A corporation may own, lease, or operate wharfage facilities, but certainly it is not a terminal and traffic cannot be delivered at or through it. The question is whether the tariffs should be construed in favor of the carriers as being meaningless and of no force and effect, as is done in the report, or in favor of the shipper as designating by the name "Transport Trading and Terminal Corporation" the Army piers as facilities over which the shipside rates applied and at which defendants would absorb the wharfage and handling charges, as was found by Division 2. The latter is the reasonable interpretation, for it permits the export rates to be applied and absorptions made in accordance with the holding out in the rate tariffs. Defendants themselves must have so interpreted the tariffs when they paid allowances to the Norfolk Tidewater Terminals, Inc., from September 1, 1925, to December 1925 and later dates, although its name was not then mentioned in the tariffs.

While it is sound as an abstract proposition that the act does not require rail carriers to provide piers or to load or unload carload traffic, with a few exceptions, we are here dealing with a concrete situation and the facts attending and surrounding that particular situation must be considered in determining defendants' legal obligations. There is nothing in the law which prohibits a rail carrier from furnishing wharfage and loading and unloading carload freight. Where carriers hold themselves out

185 in their tariffs, as they did here, by the publication of rates which include compensation for the use by shippers of such facilities and for such services, the affirmative assumption of that obligation supersedes any conclusion that might be drawn from the silence of the law on that subject. Defendants cannot legally maintain such rates, collect them, and refuse to furnish part of the services included in them. It is their duty to provide all facilities,

including wharves, and services necessary to enable them to handle, in accordance with the holding out in their tariffs, all traffic that may reasonable be expected to move.

From the time the Army piers were first made available to defendants as transshipment facilities in 1920, they have consistently paid wharfage and handling charges out of the shipside rates to the operators of those piers, except for the intermediate period when the Army operated them. They did so even when they did not have a contract with the operator. The Army piers are the largest, most modern, and best equipped wharf facilities at Norfolk and before the war about 50 percent of the export traffic moved over them. The Government by right of ownership at all times had and exercised the right to determine to whom it would lease or rent those piers. There were three changes in the control thereof before the Army took them over. In none of those instances did defendants refuse to recognize the new tenant or to pay it allowances.

In 1942 the urgency of military requirements demanded an uninterrupted flow of traffic, and this in turn, required coordination of the unloading of cars and the loading of vessels. The traffic moving over the Army piers increased a thousand percent.

There was a labor shortage and it is doubtful whether
defendants or the private operator could have ob-
186 tained the necessary men to perform the unloading
of cars. Therefore, it was necessary that the Army take over the operation of the piers. This it did on June 15, 1942. Defendants were advised of that action June 22, 1942, and after considerable correspondence they advised the Army February 16, 1943, that the carriers would not perform the handling services themselves or pay the Army an allowance for wharfage or for performing such services, but they did not reduce the rates. The consequence was that the defendants received and the Government was required to pay 4 cents per 100 pounds more than was contemplated by the tariffs. This was true although the only material difference in the manner of handling the traffic to and from the Army piers before and after June 15, 1942, was that after that date most of the inbound traffic moved in trainloads and on that the Belt performed a 1,600 foot shorter haul. The principal differences in the handling of traffic on the pier property on and after those dates were the change in control of operations on the pier from a private corporation to the Army

and the handling of about ten times as much traffic with proportionately fewer engines and crews, of which, considering the increase in traffic, a much smaller percentage was furnished by defendants.

There is little analogy between the conditions attending the operations of the Army piers by the Army and the operations of piers by commercial shippers. Defendants' responsibility and liability for the safe handling and protection of the traffic ended when it was delivered on the tracks at the Army pier; therefore, there was no necessity for defendants to police the operations. No additional facility was used. Instead there was a greater concentration of all export traffic as it was confined mostly to
187 the Army piers and the United Nations dock, notwithstanding the immense increase in the volume thereof. Defendants, therefore, received the benefit of such economy as results from a concentration of traffic and the other factors mentioned above. The fact that the traffic left the custody of the carriers was of small consequence in view of the fact that their responsibility therefor ceased when it did so and that there can be no question of the Government diverting the export traffic into other channels, concealing that fact, and claiming the handling charges on traffic so diverted. *Weyerhaeuser Timber Co. v. Pennsylvania R. Co.*, 229 I. C. C. 463, is not in point here.

There is no inference or presumption that because export rates are lower than domestic rates that they are less than maximum reasonable rates. The maintenance of such export rates is so general that it may be said to be standard practice, and we have frequently prescribed them. Due to the port differentials, the export rates to at least three of the principal north Atlantic ports, New York, Philadelphia, Baltimore and Norfolk, are lower in every instance than the domestic rates, the exception being the port to which the domestic rate is treated as the key rate under that adjustment. On all export traffic defendants save the cost incurred in delivering domestic traffic. Defendants' actions here clearly constitute a change in a rate, charge, regulation or practice, and under section 15 (7) of the act the burden of proof is upon them to show that the resulting charge is just and reasonable. That they have failed to do.

For more than 50 years export rates to north Atlantic ports have included wharfage and handling charges, and the rail carriers serving all of those ports either furnish wharves and perform the handling services or ab-

188 sorb the charges of other carriers, municipalities, or public wharfingers. At Boston, Mass., the carriers pay the Army an allowance for handling its own traffic at the Army Supply Base. The Army moves traffic over an unidentified pier at Philadelphia and receives an allowance of $1.17 a ton through the operator who acts as its agent. The Army unloads its less-than-carload freight at Baltimore and receives an allowance therefor. The report is in error in stating that no allowance similar to that at Norfolk is made at New York, Philadelphia, or Baltimore. The conclusions drawn from that statement are necessarily without any factual basis.

In my opinion there is error in the conclusion that our pronouncements in *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, have, or should have any application here. In that proceeding we dealt with questions of where the services the carriers are obligated to perform at industrial plants at the line-haul rates began and ended. We are here concerned with a situation which arises at an intermediate point while traffic is in transit. *Texas & P. Ry. Co. v. Interstate Com. Com.*, 162 U. S. 197. If the principles announced in that proceeding were applicable at Norfolk when the Army operated its piers, they were and are equally applicable at Norfolk, when the Army piers were and are operated by a private corporation, and at all other ports, but neither the majority report nor defendants suggest that such services and absorptions be discontinued.

In my opinion the rates charged were inapplicable, unreasonable and unjustly discriminatory, and the refusal of defendants to perform the handling charges and to furnish wharfage, or in lieu thereof to pay the Army an allowance, was an unreasonable practice. The complainant is
189 entitled to reparation in the amount of 4 cents per 100 pounds on all shipments moving at shipside rates over the Army piers while it operated them.

I am authorized to state that Commissioner Johnson joins in this expression.

COMMISSIONER ROGERS dissents.

ALLDREDGE, *Commissioner*, dissenting:

This is the third time this proceeding has been before us, or one of our divisions, for consideration. The issues arise in an area in which several principles of law seem to converge. The correct application of either one would produce a just decision. The issues concern, in the final analysis,

the basic duties and responsibilities of common carriers in connection with the general flow of commerce among and between individual lines or routes. Similar problems were encountered very early in the history of the commerce of the country. Certain principles of law were enunciated by the courts to clarify the problems before the Act to regulate commerce was enacted.

In the first decision by Division 2, 263 I. C. C. 303, the facts and the law were discussed and, in my judgment, a correct conclusion was reached. Upon reconsideration, however, the Commission reversed Division 2 and dismissd the claim of the Government, 264 I. C. C. 683. Upon still further consideration the latter conclusion is upheld and the Government's claim for reparation is again denied.

While I think the discussion by Division 2 in its report, 263 I. C. C. 303, is reasonably adequate for its purpose, the majority now gives concrete expression to a conception of the law which I think demands further discussion. As a matter of fact, the whole structure of the majority's
190 report rests upon an assertion of a legal principle which is inappropriate in this case. The report states:

> It is neither the legal duty of the railroads to provide piers, which are essentially steamship facilities, nor to load or unload carload freight except in unusual circumstances, such as livestock, or freight that is to be transshipped by the railroads or their agents.

As applied to the factual situation before us this statement of principles is, at best, only partly correct. The duty of providing piers, as a general rule at least, concededly may rest on steamship lines; but any attempt to correlate with the ownership of piers the duty of loading or unloading freight at points of connection between different transportation lines would produce a *non sequitur*, as it does here. There is no logical relation between the two. The duty of loading and unloading carload freight at origin and destination has long been recognized as that of the shipper and consignee. But equally long has it been recognized that a railroad's duty, when it receives freight for shipment beyond its own lines, is to take all steps reasonably necessary to effectuate delivery to its connection en route to final destination. This was the rule of the common law. In *Myrick* v. *Michigan Central R. Co.*, 107 U. S. 102, 106, it was held:

> If the road of the company connects with other roads, and goods are received for transportation beyond the

termination of its own line, there is superadded to its duty as a common carrier, that of a forwarder by the connecting line; that is, to deliver safely the goods to such line—the next carrier on the route.

That this same duty extends to a connecting water line was specifically recognized in *Texas & Pacific Ry. Co.* v. *Reiss*, 183 U. S. 621, 625.

191 This basic common law duty has not been abolished by the Interstate Commerce Act. On the contrary, section 1 (4) requires carriers by railroads to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, both rail and water. Compare *Compagnie Auxiliaire* v. *D. L. & W. R. Co.*, 87 I. C. C. 443, 446.

On export traffic "shipside" rates, which include all necessary handling to bring the freight within reach of ships' tackle, have had an unquestioned place in tariff schedules of railroads. They have applied for years at Norfolk. Under such rates defendants had, prior to June 15, 1942, undertaken, as part of their transportation duty, the terminal handling of export traffic at the same piers as those used by the Government. The change in the quality of the proprietorship of the piers and consequent disability of defendants to fulfill their recognized obligation did not dissolve it. The physical characteristics of the complete transportation service did not change. Only certain incidents in connection with the transfer of the freight from rail to steamship were altered. In such case the question of tariff applicability, which turns upon purely technical considerations, is not decisive. Reasonable tariff regulations and restrictions may govern the conditions under which such service is to be accorded. But if the transfer of the shipments in this case is a common carrier obligation defendants must afford it upon reasonable terms, or, if in changed circumstances, the shipper relieves the carrier of its burden then the latter is entitled to receive a just and reasonable allowance therefor under section 15 (13). See *El Dorado Terminal Co.* v. *General American Tank Car Corp.*, 308 U. S. 422.

192 But even if an allowance were not proper, there are other provisions of law which would intervene to protect the Government in this case against an exaction of unreasonable or unjustly discriminatory charges as pointed out by Division 2 in the first report.

I am authorized to state that Chairman Aitchison joins in this expression.

In the District Court of the United States
(Title Omitted)
(File Endorsement Omitted)

193 *Answer of Interstate Commerce Commission—Filed Dec. 19, 1947.*

The Interstate Commerce Commission, defendant in the above-entitled action, hereinafter called the Commission, for answer to the petition, answers and says:

FIRST DEFENSE

This Court is without jurisdiction under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, 28 U.S.C., Secs. 41, 43-48), to entertain the petition for the following reasons:

1. It is apparent from the petition (Paragraph III, Appendix IV, p. 61) that petitioner seeks review only of an order denying reparations for past violations of certain provisions of the Interstate Commerce Act, whereas such an order denying reparations is not reviewable in a specially constituted court under the Urgent Deficiencies Act.

2. Petitioner, having elected to bring its claim for reparations before the Commission by complaint and, having pursued that remedy to a determination, is precluded from now resorting to the alternative procedure of an action before a Federal district court, whether regularly constituted or whether, as here, a specially constituted district court.

194 SECOND DEFENSE

Without waiving the allegations of the First Defense and further answering the petition, the Commission answers and says:

I.

Answering paragraph I of the petition, the Commission admits the allegations thereof.

II.

Answering the jurisdictional allegations of paragraph II of the petition, the Commission denies the same for the reasons set forth in the First Defense.

III.

Answering paragraphs III to V, inclusive, of the petition, the Commission admits the allegations thereof.

IV.

Answering paragraphs VI to XIII, inclusive, the Commission admits and alleges that, on April 15, 1944, peti-

tioner filed with it the complaint referred to in paragraph IX; that the proceeding thereby instituted was entitled Docket No. 29117, *United States of America* v. *Aberdeen & Rockfish Railroad Company et al.*; that the defendant carriers filed separate answers, denying generally the allegations of the complaint; that the State Port Authority of Virginia, the Norfolk Port Traffic Commission, the Chamber of Commerce of Baltimore, the Chamber of Commerce and Board of Trade of Philadelphia, the Port of New York Authority and others intervened; that on July 18 and 19, 1944, the proceeding was heard before an examiner at Norfolk, Va.; that at said hearing a large volume of evidence, both oral and documentary, was introduced; that following hearings, an examiner's report, proposing dismissal of the complaint, was issued and served on the parties;
195 that exceptions to said report, and briefs were filed and, on April 5, 1945, the issues were orally argued before Division 2 of the Commission; that on August 3, 1945, the Commission, by Division 2, issued a report and order whereby (as more particularly shown in Appendix II to the petition, p. 29), it found for the complainant and awarded reparation; that, thereafter, on petition of the defendant southern carriers and separate petition by certain defendant trunk lines serving the north Atlantic ports, the proceeding was reopened for re-argument and reconsideration, the effective date of the order being postponed until further order of the Commission; that, on April 3, 1946, the issues in the proceeding were orally argued before the Commission; that, on May 3, 1946, the Commission issued its report and order, referred to in paragraph X of the petition, whereby it reversed the decision of Division 2, vacated the order and dismissed the complaint; that, thereafter, on petition of complainant and petition of one Benjamin J. Brooks, *amicus curiae*, the Commission reopened the proceeding for reargument and reconsideration; that, on November 6, 1946, the issues in the proceeding were orally reargued before the Commission; and that, on July 25, 1947, the Commission issued its report and order, referred to in paragraph XI of the petition, whereby the Commission affirmed the findings in its prior report on reconsideration and ordered the complaint dismissed.

Further answering paragraphs VI to XIII, inclusive, of the petition, the Commission alleges that in said proceedings the parties thereto, including the petitioner herein, were, and each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said proceeding

testimony and other evidence bearing upon the matters covered in said report and order were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of petitioner herein by its counsel; that in said proceedings, both orally and in briefs, questions relating to said matters were fully argued and submitted to the Commission for determination
196 on behalf of said parties by their respective counsel, including many of the particular questions raised by petitioner in this suit, whereupon the Commission determined said matters and entered and served upon the parties to said proceedings, including petitioner herein, its reports and orders on reconsideration of May 3, 1946, and July 25, 1946, annexed to and made a part of the petition as Appendices III, IV and I; that said reports and orders included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which its order of July 25, 1947, was based.

The Commission further alleges that the findings and conclusions of said reports were and are, and that each of them was and is, fully supported by the evidence submitted in said proceedings as aforesaid. The Commission further alleges that in making said reports, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings and their respective counsel, including many of the matters covered by the allegations of the petition herein.

The Commission further alleges that said reports on reconsideration and said order of July 25, 1947, were not made or entered either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support them; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each and all of the allegations to the contrary contained in the complaint. The Commission denies that its said order is unreasonable, arbitrary, unlawful, or null and void for any of the reasons set forth in said petition, or for any other reason or reasons whatever.

197 Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition, in so far as they conflict either with the allegations herein, or with either the state-

ments or conclusions of fact included in said reports on reconsideration and said order of July 25, 1947, referred to and made a part of the petition as Appendices III, IV and I.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION
By DANIEL W. KNOWLTON,
Chief Counsel.

Duly sworn to by Wm. E. Lee jurat omitted in printing (All in italics)

Service of the above answer is hereby acknowledged this 19th day of December, 1947.

DAVID O. MATHEWS
Counsel for Petitioner, United States of America.

In the District Court of the United States
(Title Omitted)
(File Endorsement Omitted)

198 *Answer of the United States of America—Filed Jan. 13, 1948*

Now comes the United States, as a defendant in the above-captioned proceeding, and, in answer to the petition filed therein, says:

I.

In accordance with a request made by this defendant's War Department, a shipper of freight and user of passenger and other transportation services of certain railroads, The United States of America filed a complaint against those railroads before the Interstate Commerce Commission, as authorized by Section 13 of the Interstate Commerce Act (49 U.S.C. 13). The Commission's order attacked in this case dismissed the complaint before the Commission, and the United States of America, feeling itself aggrieved at the dismissal of its complaint before the Commission, instituted the action before this court to set aside the Commission's order.

II.

As provided by law (28 U.S.C. Sec. 46; Judicial Code Sec. 208) the United States of America is a defendant in the above-captioned proceeding.

199 III.

The Interstate Commerce Commission is a defendant in this action and it is authorized by law to appear by its own attorneys and to defend its order without regard to the position which the United States, as a statutory defendant, may take in the action. Pursuant to this authority the Interstate Commerce Commission, by its General Counsel, has filed an answer to the petition in this case.

IV.

Under these circumstances and in view of the fact that the Interstate Commerce Commission is afforded an opportunity to present its views through its own counsel, the United States of America, as a statutory defendant, neither admits nor denies any of the allegations in the petition. See *Interstate Commerce Commission* v. *City of Jersey City*, 322 U.S. 503, 511 (1944).

JOHN F. SONNETT
Assistant Attorney General
JOHN F. BAECHER
Special Assistant to the Attorney General

Receipt is hereby acknowledged of a true copy of the foregoing answer in the above-captioned action this thirteenth day of January, 1948.

DANIEL W. KNOWLTON
Chief Counsel,
Interstate Commerce Commission
GEORGE MORRIS FAY,
United States Attorney

200 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Motion to Intervene as Defendants—Filed Feb. 2, 1948.

The Pennsylvania Railroad Company, a corporation, The Virginian Railway Company, a corporation, Southern Railway Company, a corporation, Atlantic Coast Line Railroad Company, a corporation, Seaboard Air Line Railroad Company, a corporation and Norfolk Southern Railway Company, a corporation, pursuant to Rule 24(a) of

201 the Rules of Civil Procedure, move for leave to intervene as defendants in this action in order to assert defenses set forth in the proposed pleading and answer, a copy of which is attached hereto. In support of this motion, the said corporations and each of them allege that:

1. Each of the said corporations, The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, and Norfolk Southern Railway Company is a common carrier by rail serving Norfolk, Virginia.

2. Petitioner, the United States of America, prays in its complaint that the order of the Interstate Commerce Commission, entered in the proceeding known as *United States of America v. Aberdeen & Rockfish Railroad Company, et al*, Docket No. 29117, be suspended, enjoined, set aside or annulled.

3. The proceeding before the Interstate Commerce Commission referred to in paragraph 2 hereof was instituted by the petitioner, United States of America, on April 15, 1944 and The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company and Norfolk Southern Railway Company were named as defendants in said proceeding and each of said corporations was a party in interest in said proceeding.

4. This suit involves the validity of the order of the Interstate Commerce Commission referred to in paragraph 2 hereof, and the interests of The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company and Norfolk Southern Railway Company may be adversely affected by any order or judgment entered in this action.

202 5. Sections 212 and 213 of the Judicial Code, as amended (28 U. S. C. A. 45 a) confer on The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company and Norfolk Southern Railway Company an unconditional right to intervene in this action.

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Philadelphia 4, Pennsylvania.
HUGH B. COX,
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Washington 5, D. C.,
Attorneys for The Pennsylvania Railroad Company.

CHARLES P. REYNOLDS,
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CHARLES CLARK,
A. J. DIXON,
P. O. Box 1808,
Washington, D. C.,
Attorneys for Southern Railway Company.

To:
UNITED STATES OF AMERICA,
Plaintiff.

To:
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants.

Please take notice that the undersigned will
203 bring the above motion for hearing before this Court at a time, day and place set by the Court.

WINDSOR F. COUSINS,
HUGH B. COX,
Attorneys for The Pennsylvania Railroad Company.

CHARLES P. REYNOLDS,
Attorney for Atlantic Coast Line Railroad Company; Seaboard Air Line Railroad Company; Norfolk Southern Railway Company.

FRED N. OLIVER,
Attorney for The Virginian Railway Company.

CHARLES CLARK,
A. J. DIXON,
Attorneys for Southern Railway Company.

Dated: February 2, 1948.

I hereby certify that a copy of the foregoing Motion to Intervene as Defendant and the accompanying Intervenors' Answer to Complaint were mailed, postage prepaid, to the Attorney General of the United States, attention of James E. Kilday and David O. Matthews, Special Assistants to the Attorney General (attorneys for the plaintiff, United States of America) United States Department of Justice, Washington 25, D. C.; to Daniel W. Knowlton (attorney for the defendant, Interstate Commerce Commission) Interstate Commerce Commission, Washington 25, D. C.; and to the Attorney General of the United States, attention of John F. Sonnett, Assistant Attorney General (attorneys for the defendant, United States of America) United States Department of Justice, Washington 25, D. C.

204

HUGH B. COX,
Southern Building,
Washington 5, D. C.
Attorney for The Pennsylvania Railroad Company.

Dated: February 2, 1948.

In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

205 *Order Granting Leave to Intervene as Defendants—Filed March 1, 1948*

This cause was heard on the motion of The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company and Norfolk Southern Railway Company, pursuant to Rule 24 (a) of the Rules of Civil Procedure, for leave to intervene as defendants herein and the Court having considered the motion and being advised in the premises, it is

ORDERED that The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company and Norfolk Southern Railway Company be and they hereby are granted leave to intervene herein as defendants.

(illegible)

.....

Justice.

Dated: This 1st day of March, 1948.

In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

206 *Interveners' Answer to Complaint—Filed March 2, 1948*

Now come The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company and Norfolk Southern Railway Company, referred to hereafter as the "defendant interveners" and answer the complaint as follows:

First Defense

As a first and complete defense defendant interveners allege that the Court is without jurisdiction because:

1. United States of America is both plaintiff in this action and an indispensable party defendant, the only defendant against whom an action can be instituted to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission. (Judicial Code, Sections 208, 211, 212 and 213, 28 U. S. C. 45 a, 46, 48).

207 2. The Interstate Commerce Commission is an instrumentality and agency of the United States of America and is granted a discretionary right to intervene in suits involving the validity of an order of said Commission, but it is not a necessary or indispensable party to such suit (28 U. S. C. 45 a).

3. The United States of America, or its instrumentality, the Interstate Commerce Commission, are the only parties defendant against whom relief can be obtained in this suit.

4. There is, therefore, no justiciable case or controversy within the meaning of Article III, Section 2 of the Constitution of the United States.

Second Defense

As a second complete defense defendant interveners allege that this Court is without jurisdiction because neither the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, 28 U. S. C. 41, 43-48) nor any other statute of the United States gives the United States standing to institute an action to enjoin, set aside, annul or suspend an order of the Interstate Commerce Commission.

Third Defense

As a third complete defense defendant interveners allege that this Court is without jurisdiction under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, 28 U. S. C. 41, 47-48) to entertain the complaint because:

1. The complaint seeks only to review an order of the Interstate Commerce Commission denying reparations for past charges alleged to be unreasonable or unlawful under certain provisions of the Interstate Commerce Act. The said charges alleged to be unlawful or unreasonable were made during the period from June 15, 1942 to June 20, 1946 when the War Department of the United States operated Army Base piers 1 and 2 at Norfolk, Virginia, and said charges were alleged to be unreasonable or unlawful for the reason that during the period in which said piers were operated by the War Department of the United States of America, the War Department performed certain services and furnished a facility for which it was not compensated by the defendant interveners. On or about June 20, 1946 the War Department of the United States of America ceased to operate Army Base piers 1 and 2 and has not operated said piers since that date. The order of the Interstate Commerce Commission which petitioner is seeking to suspend, enjoin, set aside or annul herein, was made and issued on July 25, 1947, and in the "Report of the Commission on Reargument" issued on the same date (incorporated as Appendix IV to the complaint) the said Commission found and concluded that "the purpose of this proceeding now is for reparation only."

208

2. An order of the Interstate Commerce Commission denying reparation for past charges alleged to be unreasonable or unlawful is not reviewable in a court specially constituted under the said Urgent Deficiencies Act.

3. The United States of America having elected and having followed the procedure of bringing its claim for reparations before the Interstate Commerce Commission by complaint is now precluded from resorting to the alternative procedure of an action in a specially constituted District Court of the United States or any other District Court (Interstate Commerce Act § 9; 49 U. S. C. 9).

209 *Fourth Defense.*

Defendant interveners, without waiving the allegations in the First, Second and Third Defenses, answer the specific allegations of the complaint as follows (the paragraphs of this Defense are numbered to correspond with the paragraph numbers in the complaint):

I. Defendant interveners deny that the United States has standing to institute this action as alleged in Paragraph I of the complaint, and they deny that the report of the Interstate Commerce Commission, incorporated by reference as Appendix IV to the complaint, is a true and correct copy of the "Report of the Commission on Reargument" dated July 25, 1947, Docket No. 29417, because the following is omitted after the word "complainant" on page 54, line 17 of the complaint, "At the insistence of complainant".

II. Defendant interveners deny that the Court has jurisdiction as alleged in Paragraph II of the complaint for the reasons set forth in the First, Second and Third Defenses.

III. Defendant interveners admit the allegations of Paragraph III of the complaint.

IV. Defendant interveners admit the allegations of Paragraph IV of the complaint.

V. Defendant interveners deny that they have knowledge or information sufficient to form a belief as to the allegations of Paragraph V of the complaint, except that they admit that the Hampton Roads Port of Embarkation was established to embrace the principal port facilities in the Norfolk area, including Army Base piers 1 and 2, and that effective on June 15, 1942, the lease of Army Base piers 1 and 2 to the Transport
210 Trading and Terminal Corporation was cancelled and thereafter the War Department of the United States of America operated said piers until on or about June 20, 1946.

VI. Defendant interveners deny the allegations in the first sentence of Paragraph VI of the complaint.

VII. Defendant interveners deny the allegations of the first sentence of Paragraph VII of the complaint. Defendant interveners deny the allegation in the last sentence of Paragraph VII of the complaint that they failed or refused to provide wharfage or to perform handling services contemplated by their tariffs.

VIII. Defendant interveners deny each and every allegation in Paragraph VIII of the complaint, except

that defendant interveners admit (1) the allegations of the first sentence of the first paragraph thereof and (2) that prior to 1942, wharfage and handling between cars and ships at Army Base piers 1 and 2 were provided by public terminal operators, and that they were compensated therefor in the amount of four cents per hundred pounds to the extent that they acted as agents for defendant interveners.

In further answer to the allegations in Paragraph VIII of the complaint, defendant interveners allege that on May 1, 1942 the War Department of the United States of America served a written request on defendant interveners, and they allege that on May 22, 1943 a second written request was served on defendant interveners by the War Department; the Court is respectfully referred to each of said requests for the full terms thereof. Defendant interveners allege that each of defendant interveners refused to comply with each said request and at no time during the period in which the War Department operated Army Base piers 1
241 and 2 did defendant interveners offer to perform or perform the services so requested.

IX. Defendant interveners deny the allegations of the first sentence of the first paragraph of Paragraph IX of the complaint, except that defendant interveners admit that on April 15, 1944 the United States of America filed with the Interstate Commerce Commission a complaint charging violations of Sections 1 (5) (a), 1 (6), 2, 6 (8) and 15 (13) of the Interstate Commerce Act; the Court is respectfully referred to said complaint for the full terms thereof. In answer to the second sentence of the first paragraph of Paragraph IX of the complaint, the defendant interveners deny that the complaint filed with the Interstate Commerce Commission prayed for or requested an order requiring the defendant interveners to render wharfage and handling services at Army Base piers 1 and 2.

X. Defendant interveners admit the allegations of Paragraph X of the complaint.

XI. Defendant interveners admit the allegations of Paragraph XI of the complaint.

XII. Defendant interveners deny the allegations of Paragraph XII of the complaint and deny that the order of the Interstate Commerce Commission is unlawful for any of the reasons therein mentioned or for any other reason.

XIII. Defendant interveners deny the allegations of Paragraph XIII of the complaint.

WHEREFORE, defendant interveners respectfully
212 pray that the complaint be dismissed.

WINDSOR F. COUSINS,
Broad Street Station Building,
Philadelphia 4, Pennsylvania.

HUGH B. COX,
Southern Building,
Washington 5, D. C.,
Attorneys for The Pennsylvania Railroad Company.

CHARLES P. REYNOLDS,
1116 Shoreham Building,
Washington 5, D. C.,
Attorney for Atlantic Coast Line Railroad Company; Seaboard Air Line Railroad Company; Norfolk Southern Railway Company.

FRED N. OLIVER,
1106 Investment Building,
Washington 6, D. C.,
Attorney for The Virginian Railway Company.

CHARLES CLARK,
A. J. DIXON,
P. O. Box 1808,
Washington, D. C.,
Attorneys for Southern Railway Company.

Dated: March 2, 1948.
PAUL MCARDLE.

213 In the District Court of the United States
(Title Omitted)
(File Endorsement Omitted)

Application for Three-Judge Court—Filed April 6, 1948

Now comes the United States, petitioner in the above-captioned action, and states that:

1. This is an action to enjoin, set aside and annul an order of the Interstate Commerce Commission.

2. Under the Urgent Deficiencies Act of October 22, 1913, as amended (38 Stat. 220; 28 U. S. C., 1940 ed. 47), such actions shall be heard and determined by three judges,

of whom at least one shall be a circuit judge, and upon application being presented to a judge he shall immediately call to his assistance, to hear and determine the cause, two other judges; and such hearing and determination shall be given preference and shall be in every way expedited and assigned for a hearing at the earliest practicable day.

Now Therefore, petitioner applies to Associate Justice of the District Court of the United States for the District of Columbia, and requests that said Justice immediately call to his assistance the other judges, as provided by law, and requests that the final hearing and determination of the action be expedited.

214

James E. Kilday,
David O. Mathews,
Special Assistants to the Attorney General.

James C. Moore,
Frank F. Vesper,
Special Attorneys.

John F. Sonnett,
Assistant Attorney General.

George Morris Fay,
United States Attorney.

215 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Order Convening Three Judge Court—Filed April 12, 1948.

It appearing that application having been made by petitioner on the 6th day of April, 1948, to convene a three-judge court, and it further appearing that petitioner herein has applied for an order of this court to enjoin and set aside an order of the Interstate Commerce Commission, I hereby call to my assistance Hon. Bennett Champ Clark, Associate Justice of the United States Court of Appeals for the District of Columbia and Hon. Matthew F. McGuire, Associate Justice of the District Court of the United States for the District of Columbia to sit with me as a court of three judges to hear and dispose of the above-entitled cause.

Alexander Holtzoff,
Associate Justice of the District Court of the United States for the District of Columbia.

Dated: April 12, 1948.

216 District Court of the United States for the District of Columbia

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Defendants.

(File Endorsement Omitted)

Civil Action No. 4729-47

Before CLARK, Associate Justice, United States Court of Appeals for the District of Columbia; and McGUIRE and HOLTZOFF, Associate Justices, District Court of the United States for the District of Columbia, sitting as a statutory three-judge court.

Opinion—Filed June 28, 1948

This is an action brought before a statutory three-judge court to set aside an order of the Interstate Commerce Commission, dismissing a complaint of the United States, by which the United States sought an allowance from certain railroads for wharfage and handling services rendered in connection with shipments made by the
217 Government during World War II at Norfolk, Virginia. The action is brought under the Urgent Deficiencies Act (U. S. Code, title 28, sec. 41, par. 28, and secs. 43-48) and under Section 9 of the Interstate Commerce Act (U. S. Code, title 49, sec. 9).

For a great many years it had been the general practice of railroads serving North Atlantic ports, including Norfolk, to load and unload from car to pier, and vice versa, traffic brought to the port by rail and intended to be transhipped by vessel. The charges for this service, known as wharfage, were included and absorbed in the railroad traffic rates. At the Port of Norfolk, the cost of this labor to the railroads was four cents per hundred pounds. This sum constituted the compensation paid by the carriers to The Transport Trading and Terminal Corporation, which actually performed this task in their behalf.

During World War II, the War Department shipped a substantial volume of goods from various points in the United States to Norfolk, over the trunk line railroads serving that port, for transportation by vessel to points beyond Norfolk, as well as from points beyond Norfolk to points in the interior. Due to the emergency the Government took over the piers at which these goods were

218 handled, and performed the wharfage services itself with its own employees. Nevertheless, the railroads persisted in charging and the Government continued to pay the full traffic rate for transportation, which included four cents per hundred pounds as cost of wharfage.

In view of the fact that the Government had performed the service itself, the United States filed a complaint with the Interstate Commerce Commission praying for reparation at the rate of four cents per hundred pounds on all of the goods that were handled by the Government at Norfolk in the above described manner. The Interstate Commerce Commission dismissed the complaint, on the basis of a finding that the refusal of the railroads to make the allowance to the United States for the wharfage services performed by the Government itself on its own shipments, was not an unsound or unreasonable practice, did not result in unreasonable or inapplicable rates and was not unjustly discriminatory to the United States, *United States* v. *Aberdeen & Rockfish RR Co.*, 263 I. C. C. 303 and 264 I. C. C. 683. Thereupon the present action was brought to review the decision of the Interstate Commerce Commission and to set aside its order, which had been issued on July 25, 1947.

219 At the outset it becomes necessary to determine whether this action may be maintained. Section 9 of the Interstate Commerce Commission Act (U. S. Code, title 49, sec. 9), provides as follows:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *"

In other words, the law accords two alternative remedies to any person who is damaged by any action of a common carrier violative of the Interstate Commerce Act. The injured party either may make a complaint to the Interstate Commerce Commission or may bring an action for damages against the carrier in the District Court of the United States. The two remedies are mutually exclusive.

In this instance, the United States did not choose to bring suit against the railroads in the District Court of the United States, but elected to present a complaint to the Interstate Commerce Commission. The United
220 States now seeks a review of the adverse decision of the Commission by an action brought before a three-judge court.

The statute regulating actions to review orders of the Interstate Commerce Commission (U. S. Code, title 28, sec. 46) provides, in part, as follows:

> "Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. * * *"

An action of this type is a suit against the United States, *United States* v. *Griffin*, 303 U. S. 226, 238.

In other words, a suit to review an order of the Interstate Commerce Commission must be brought against the United States as the defendant. Accordingly, in this action the United States of America is named both as the petitioner and as the defendant. The Interstate Commerce Commission is added as co-defendant, although there seems to be no warrant in law for this course.[2] We are thus confronted with an anomaly,—a suit by the United States of America against the United States of America.

221 The United States is not a mere nominal party defendant. The legislative history of the above-mentioned statute demonstrates that the Congress deliberately and intentionally provided that such suits should be brought against the United States and that this requirement was no inadvertence. It was first introduced into the law by the Act which created the Commerce Court (Act of June 18, 1910, Sec. 3., 36 Stat. 539, 542). The provision was debated at length on the floor of each House. These discussions clearly indicated that it was the intention of the authors of the legislation that the Attorney General of the United States should appear in behalf of the United States, and defend the action of the Interstate Com-

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[1] Such an action must be heard by a three-judge court, U. S. Code, title 28, sec. 47.

[2] The law authorizes the Commission to intervene in the suit, but does not provide for making the Commission a party defendant originally. U. S. Code, title 28, sec. 45a.

merce Commission.[3] Attempts were made to modify this provision in order that the action might be brought against the Interstate Commerce Commission, rather than against the United States, but these endeavors were defeated.

It is clearly, therefore, the duty of the Department of Justice to defend the order of the Interstate Commerce Commission. Necessarily, the Department may not be on both sides of the case. Yet an examination of the petition filed by the United States, and of the answer filed in its behalf, indicates that both pleadings were signed by the same Assistant Attorney General.

No person may sue himself, *Lord* v. *Veazie*, 8 How. 250; *Cleveland* v. *Chamberlain*, 66 U. S. 419; *Wood Paper Co.* v. *Heft*, 8 Wall. 333. This principle is applicable to the United States. The Government may not sue itself. This is true even if the nominal plaintiff is a party who
223 is subrogated to the rights of the Government, *Globe & Rutgers Fire Ins. Co.* v. *Hines*, 273 Fed. 774, 777; *Defense Supplies Corp.* v. *United States Lines Co.*, 148 F. (2d) 311.

In *Globe & Rutgers Fire Ins. Co.* v. *Hines*, *supra*, the court stated (p. 777):

> "It is elementary that the same person cannot be both plaintiff and defendant at the same time in the same action. It is incongruous that the same person should direct and conduct both the prosecution and the defense of the same suit, no matter in what capacity he may appear."

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[3] Senator Elihu Root made the following statement on the floor of the Senate (45 Cong. Rec. p. 4104):

> "The Attorney General would be bound upon all and the highest considerations of his professional honor and his official duty to defend the order of the Interstate Commerce Commission in all courts having jurisdiction to review it."

Representative Townsend said, on the floor of the House of Representatives (45 Cong. Rec. p. 5525):

> "* * * when it *(i.e.* an order of the Interstate Commerce Commission) is attacked it becomes the duty of the Attorney General to defend."

Senator Sutherland (later Mr. Justice Sutherland) said (45 Cong. Rec. p. 6457):

> "The order of the Interstate Commerce Commission is quasi legislative, and, as I have said, it becomes, in substance and effect, the order of the Government of the United States, and it simply occurs to me that it is more fitting that the action to have the order declared invalid as invading the constitutional rights of the railroad company should proceed against the Government of the United States than it is to have it proceed against the Interstate Commerce Commission."

It may be observed in this connection, that the United States of America always acts in a sovereign capacity. It does not have separate governmental and proprietary capacities, *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477.*

The foregoing rules are but applications of the general doctrine that Federal courts may deal only with actual cases and controversies, *Muskrat* v. *United States*, 219 U. S. 346; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 239-241. Naturally there cannot be a controversy if the same party is both plaintiff and defendant. If attorneys
224 representing the Department of Justice appear on both sides of the same case, there is no actual controversy, but merely a discussion or debate of a moot question.

It is the view of this court, therefore, that this action may not be maintained, as the United States of America is both plaintiff and defendant. This conclusion is accentuated by the fact that it is the duty of the Department of Justice under the statute to defend the action of the Interstate Commerce Commission.

The cases on which the Government relies are not in point. In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 573, the plaintiffs in the action brought before the three-judge court were A. L. Mechling, a water carrier, the Inland Waterways Corporation, and the Secretary of Agriculture. The latter was authorized by a specific statutory provision to seek judicial relief with respect to rates and charges for the transportation of farm products. Consequently, it was not a case in which the United States was both plaintiff and defendant.

In *United States* v. *Public Utilities Commission*, 151 F. (2d) 609, a direct appeal was taken from an order of an administrative agency. This case, too, did not involve a situation in which the same party, the United States of America, was both plaintiff and defendant.

225 It is further urged that an order of the Interstate Commerce Commission of the type involved in this case is not reviewable in an action brought before a three-judge statutory court. This position is clearly sustained by *Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708; affirmed 325 U. S. 840, in which Judge Dobie wrote an exhaustive and persuasive opinion. It is argued, however, that this decision has been, in effect, overruled in *El Dorado*

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* *United States* v. *Horowitz*, 267 U. S. 458, which holds to the contrary, must be deemed to have been overruled by *Graves* v. *N. Y. ex rel. O'Keefe* cited in the text

Oil Works v. *United States*, 328 U. S. 12. The opinion in the *El Dorado* case does not refer to the *Ashland* case. Whether the *Ashland* case must be deemed overruled, need not be decided, in view of the disposition hertofore indicated.

It has been suggested that unless the United States of America may maintain this action, it is without a remedy. This contention is hardly well founded, because the United States has the opportunity of electing the other alternative remedy provided by the statute, namely, to bring suit against the common carriers in the United States District Court. Under any circumstances, this Court must enforce the will of the Congress, which clearly did not contemplate or intend to permit a suit by the United States of America against the United States of America, to review
226 an order of the Interstate Commerce Commission.

If the situation here presented is a *casus omissus*, the remedy lies solely with the legislative branch of the Government.

In view of the foregoing considerations, we do not reach the merits of the case.

Judgment dismissing the complaint.

BENNETT CHAMP CLARK,
Justice.

MATTHEW F. McGUIRE,
Justice.

ALEXANDER HOLTZOFF,
Justice.

June 28, 1948.

227 District Court of the United States
for the District of Columbia

(File Endorsement
Omitted)

UNITED STATES OF AMERICA,
Plaintiff.

Civil Action No. 4729-47

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Defendants.

Order Dismissing Complaint—Filed July 26, 1948

This cause came on for hearing on the answer of the United States, The Interstate Commerce Commission and

the intervening defendants, and the Court having heard the argument of counsel and being fully advised,

IT IS ORDERED that the complaint be and it is hereby dismissed.

Dated July 1, 1948.

BENNETT CHAMP CLARK
Associate Justice,
United States Court of Appeals for the District of Columbia.

ALEXANDER HOLTZOFF
Associate Justice,
District Court of the United States for the District of Columbia.

MATTHEW F. McGUIRE
Associate Justice,
District Court of the United States for the District of Columbia.

Approved as to form .....
DAVID O. MATHEWS
Special Assistant to the Attorney General.

In the District Court of the United States

228 (Title Omitted)

(File Endorsement Omitted)

Petition for Appeal—Filed Aug. 25, 1948

The United States of America, plaintiff in the above cause, considering itself aggrieved by the final judgment of this Court entered on the 26th day of July, 1948, does hereby pray an appeal from said final judgment to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein plaintiff considers the judgment erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition, to which reference is hereby made.

229 Plaintiff prays that this appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said judgment was based, duly authenticated,

be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

HERBERT A. BERGSON
Assistant Attorney General

JAMES E. KILDAY
DAVID O. MATHEWS
Special Assistants to the Attorney General

Dated this 25 day of August, 1948.

In the District Court of the United States
230 (Title Omitted)
(File Endorsement Omitted)

Order Allowing Appeal—Filed Aug. 25, 1948

In the above case the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court entered in this cause on the 26th day of July, 1948, and having also made and filed its petition for appeal, assignment of errors and prayer for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

IT IS THEREFORE ORDERED AND ADJUDGED

That the appeal be and the same is hereby allowed as prayed for.

ALEXANDER HOLTZOFF
Associate Justice

Dated this 25th day of August, 1948.

231 In the District Court of the United States
(Title Omitted)
(File Endorsement Omitted)

Assignment of Errors and Prayer for Reversal—Filed Aug. 25, 1948.

The United States of America, plaintiff in the above cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and to the entry in the district court of final judgment in the above cause on July 26, 1948, and says that in the entry of the final decree the district court committed error to the prejudice of the plaintiff in the following particulars:

The court erred:

1. In holding that Congress, when it enacted the provisions of the Urgent Deficiencies Act which authorize suits in federal district courts to set aside orders of the Interstate Commerce Commission, did not intend to permit the United States to bring such a suit.

2. In holding that this action may not be maintained for the reason that it is a proceeding in which the United States is both plaintiff and defendant.

233 Citation in usual form, filed Aug. 25, 1948 omitted in printing.

238 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Praecipe for Record—Filed Aug. 27, 1948

To the Clerk of the Above-Named Court:

Please prepare a transcript of the record in the above-captioned cause, to be transmitted to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Petition and appendices attached thereto;

2. Answer of the Interstate Commerce Commission;

3. Petition for intervention of The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railway Company, Seaboard Air Line Railroad Company and Norfolk Southern Railway Company; and order allowing intervention;

4. Answer of The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railway Company, Seaboard Air Line Railroad Company and Norfolk Southern Railway Company, intervening defendants;

239 5. Answer of the United States of America, as statutory defendant;

6. Application for order and order convening three-judge court under provisions of the Urgent Deficiencies Act of October 22, 1913;

7. Opinion of the Court filed on June 28, 1948;

8. Judgment of the Court entered on July 26, 1948;

9. Petition for appeal, order allowing appeal, assignment of errors and prayer for reversal, statement as to

jurisdiction, citation, and statement calling atttention to the provisions of Supreme Court Rule 12(3), and proof of service thereof;

10. This praecipe and proof of service thereof.

HERBERT A. BERGSON
Assistant Attorney General

JAMES E. KILDAY
DAVID O. MATHEWS
Special Assistant to the Attorney General

Dated August 26, 1948.

240 *Proof of Service*

Service of the praecipe is accepted and copies received this 26 day of August, 1948.

DANIEL W. KNOWLTON
Chief Counsel,
Interstate Commerce Commission.

HUGH B. COX
Counsel for The Pennsylvania Railroad Company.

CHAS. P. REYNOLDS
Counsel for Atlantic Coast Line Railway Company; Seaboard Air Line Railroad Company; Norfolk Southern Railway Company.

241 MARTIN A. MEYER, JR.
Counsel for The Virginian Railway Company.

CHARLES CLARK
A. J. DIXON
Counsel for Southern Railway Company.

244 In the District Court of the United States
(Title Omitted)
(File Endorsement Omitted)

Counter Praecipe—Filed Sept. 3, 1948

TO THE CLERK OF THE UNITED STATES DISTRICT COURT:

The defendant, the Interstate Commerce Commission, designates the following additional matters to be included in the transcript of the record on appeal:

1. The following pages of the transcript of hearing on May 5, 1948, before the District Court: page 5, beginning with the word "Statement" in line 8 and ending with the end of the page; and page 7, beginning with the word "Opening" in line 2 and ending with the word "objection" in line 11.

2. The certified copy of the entire record made in the proceeding before the Interstate Commerce Commission entitled, *United States* v. *Aberdeen & Rockfish Railroad Co. et al.*, Docket No. 29,117, filed in this cause on
245 May 5, 1948, said certified copy consisting of four volumes or parts.

3. This praecipe.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

September 3, 1948.

I, Daniel W. Knowlton, certify that copies of the foregoing Counter Praecipe were this day mailed to the following persons:

DAVID O. MATHEWS, ESQ.,
Special Assistant to the Attorney General for petitioner, United States of America.

HERBERT A. BERGSON, ESQ.,
Assistant Attorney General for Defendant, United States of America.

HUGH B. COX, ESQ.,
Southern Building,
Washington 5, D. C.
Attorney for The Pennsylvania Railroad Company.

CHARLES P. REYNOLDS, ESQ.,
1110 Shoreham Building,
Washington 5, D. C.
Attorney for Atlantic Coast Line Railroad Co.; Seaboard Air Line Railroad Co.; Norfolk Southern Railway Company.

246 FRED N. OLIVER, ESQ.,
1106 Investment Building,
Washington 6, D. C.,
Attorney for The Virginian Railway Company.

CHARLES CLARK, ESQ.,
A. J. DIXON, P. O. Box 1808,
Washington, D. C.,
Attorneys for the Southern Railway Company.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

This 3d day of September, 1948.

247 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Counter Praecipe—Filed Sept. 4, 1948

TO THE CLERK OF THE UNITED STATES DISTRICT COURT:

The Interveners, The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, and Norfolk Southern Railway Company designate the following additional matters to be included in the transcript of the record on appeal:

1. The following pages of the transcript of hearing on May 5, 1948, before the District Court: page 5, beginning with the word "Statement" in line 8 and ending with the end of the page; and page 7, beginning with the word "Opening" in line 2 and ending with the word "objection" in line 11.

2. The certified copy of the entire record made in the proceeding before the Interstate Commerce Commis-
248 sion entitled, United States v. Aberdeen & Rockfish Railroad Co. *et al*, Docket No. 29,117, filed in this cause on May 5, 1948, said certified copy consisting of four volumes or parts.

3. This praecipe.

WINDSOR F. COUSINS,
Broad Street Station Building,
Philadelphia 4, Pennsylvania.

HUGH B. COX,
Southern Building,
Washington 5, D. C.,
Attorney for The Pennsylvania Railroad Company.

CHAS. P. REYNOLDS,
1110 Shoreham Building,
Washington 5, D. C.,
Attorney for Atlantic Coast Line Railroad Company; Seaboard Air Line Railroad Company; Norfolk Southern Railway Company.

FRED N. OLIVER,
1106 Investment Building,
Washington 6, D. C.,
Attorney for The Virginian Railway Company.

CHARLES CLARK.
A. J. DIXON;
P. O. Box 1808,
Washington, D. C.,
Attorneys for the Southern Railway Company.

Dated: September 3, 1948.

249 *Proof of Service*

Service of the Interveners' Counter Praecipe is accepted and copies thereof received this 3rd day of September, 1948.

DAVID O. MATHEWS,
Attorney for Petitioner,
United States of America.

(Illegible)

.....

Assistant to Attorney General
Attorneys for Defendant,
United States of America.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

250 In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Amended Praecipe—Filed Sept. 8, 1948

TO THE CLERK OF THE ABOVE-NAMED COURT:

Please prepare a transcript of the record in the above-captioned cause, to be transmitted to the Clerk of the

Supreme Court of the United States, and include in said transcript the following:

1. Petition and appendices attached thereto;
2. Answer of the Interstate Commerce Commission;
3. Petition for intervention of The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railway Company, Seaboard Air Line Railroad Company and Norfolk Southern Railway Company, and order allowing intervention;
4. Answer of The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railway Company, Seaboard Air Line Railroad Company and Norfolk Southern Railway Company, intervening defendants;

251 5. Answer of the United States of America, as statutory defendant;

6. Application for order and order convening three-judge court under provisions of the Urgent Deficiencies Act of October 22, 1913;
7. Transcript of hearing on May 5, 1948 before the District Court;
8. Opinion of the Court filed on June 28, 1948;
9. Judgment of the Court entered on July 26, 1948;
10. Petition for appeal, order allowing appeal, assignment of errors and prayer for reversal, statement as to jurisdiction, citation, and statement calling attention to the provisions of Supreme Court Rule 12(3), and proof of service thereof;
11. Praecipe for preparation of transcript of record and proof of service thereof;
12. This amended praecipe and proof of service thereof.

HERBERT A. BERGSON
Assistant Attorney General.

JAMES E. KILDAY
DAVID O. MATHEWS
Special Assistants to the Attorney General

Dated September 8th, 1948.

252 *Proof of Service*

Service of the amended praecipe is accepted and copies received this day of September, 1948.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

HUGH B. COX,
Counsel for The Pennsylvania Railroad Company.

CHAS. P. REYNOLDS,
Counsel for Atlantic Coast Line Railway Company; Seaboard Air Line Railroad Company, Norfolk Southern Railway Company.

253 FRED N. OLIVER,
Counsel for The Virginian Railway Company.

CHARLES CLARK,
By L. L. OLIVER,
Counsel for Southern Railway Company.

253½ In the District Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Order for Transmission of Original Copy of the Certified Transcript of Proceedings Before the Interstate Commerce Commission in Lieu of a Photostat Thereof—Filed Sept. 10, 1948

Upon the application of the defendant, the Interstate Commerce Commission, it is by this Court this 9th of September, 1948,

ORDERED, that the certified copy of the entire record in the proceeding before the Interstate Commerce Commission, entitled United States of America v. Aberdeen & Rockfish Railroad Company *et al.*, Docket No. 29117, filed in this cause on May 5, 1948, said certified copy consisting of four volumes or parts, be forwarded to the United
255 States Supreme Court for use in connection with the appeal to said Court, in lieu of a photostatic copy thereof.

BENNETT CHAMP CLARK.

Dated this 9th day of September, 1948.

Consented to:

DAVID O. MATHEWS,
Special Assistant to the Attorney General, for petitioner, United States of America.

HERBERT A. BERGSON,
Assistant Attorney General,
for defendant, United States of America.

HUGH B. COX,
Attorney on behalf of all interveners.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission, for defendant, Interstate Commerce Commission.

256 United States District Court
For the District of Columbia

Clerk's Certificate to foregoing transcript omitted in printing.

258 BEFORE THE
INTERSTATE COMMERCE COMMISSION

I. C. C. DOCKET No. 29117

UNITED STATES OF AMERICA, COMPLAINANT

v.

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
DEFENDANTS

Complaint—Filed April 15, 1944

The United States of America, by its attorneys, acting under direction of the Attorney General of the United States, for cause of complaint against the persons named in Appendix "A," which is attached hereto and made a part hereof as if fully set out herein, respectfully shows:

I

That each of the defendants named in Appendix "A" is a common carrier by railroad engaged in the transportation of property in interstate or foreign commerce and as such is subject to the provisions of the Interstate Commerce Act.

II

That the War Department, one of the executive departments of the Government of the United States,
259 in the performance of its functions and in the prosecution of the war, has shipped, is presently shipping

and expects to continue to ship over the lines of the defendants a substantial volume of goods from various points in the United States to Norfolk, Virginia, for export by vessel to foreign countries, and has shipped, is presently shipping and expects to continue to ship over the lines of the defendants from Norfolk, Virginia, to various points throughout the United States a substantial volume of goods which have been imported by vessel from foreign countries. Such goods consist of so many different items that it is impracticable to list them in this complaint. The transportation charges on such shipments have been, are, and will continue to be paid or borne by the complainant.

III

That defendants have published and presently maintain class and commodity rates which apply to or from Norfolk, Virginia, on export, import, intercoastal and coastwise traffic, which originates at or is destined to points throughout the United States. The rates and charges maintained by the defendants on such traffic and the tariffs containing such rates and charges are too numerous to be set out in full herein, and for that reason complainant only refers to a few representative tariffs, to wit:

Central Freight Association Freight Tariff No. 490-B, Agent B. T. Jones' I. C. C. No. 3642.

260 Central Freight Association Freight Tariff No. 218-N, Agent B. T. Jones' I. C. C. No. 3758.

Southern Freight Tariff Bureau Freight Tariff No. 705-F, Agent R. H. Hoke's I. C. C. No. 903.

Western Trunk Lines' Freight Tariff 329-H, Agent L. E. Kipp's I. C. C. No. A-3475.

Trunk Line Tariff Bureau Freight Tariff 107-C, Agent W. S. Curlett's I. C. C. No. A-767.

IV

That the rates maintained by the defendants and published in the tariffs referred to in paragraph III above on export, import, intercoastal, and coastwise traffic, except certain traffic from or to points in Southern territory, are applicable to or from shipside at Norfolk, Virginia, either by specific designation in the rate tariffs or by the application of terminal tariffs published and maintained by the defendants. The terminal tariffs provide generally for the absorption of wharfage and handling charges for services incident to effecting receipt or delivery of freight at shipside on traffic which originates at or is destined to

points in so-called "absorption territory," which, as defined in the said tariffs, embraces generally all points in the United States with the exception of certain points in Southern territory. The terminal tariffs containing the said absorption provisions are:

Atlantic Coast Line Railroad Company Tariff No. 91-2A, I. C. C. No. B-3068.

261 Norfolk and Western Railway Company Tariff GF No. 23F, I. C. C. No. 9179.

Norfolk Southern Railway Company Tariff FTD 338, I. C. C. No. A-1148.

Pennsylvania Railroad Company Tariff No. 1378-H, I. C. C. No. 2613.

Seaboard Air Line Railway Company Tariff No. 34-E, I. C. C. No. A-8079.

Southern Railway Company Port Charges Tariff No. 10, I. C. C. No. A-11013.

Virginian Railway Company Tariff No. 1813-K, I. C. C. No. 2196.

The absorption provisions published and maintained by the defendants in the tariffs referred to in this paragraph have been since June 15, 1942, and now are applicable generally on export, import, intercoastal and coastwise traffic handled over certain facilities located at Norfolk, Virginia, including those of Lincoln Tidewater Terminals, Incorporated, Lambert's Point Docks, Incorporated (Lambert Point Division), and the Transport, Trading and Terminal Corporation, except that the absorption provisions published and maintained by defendant Norfolk and Western Railway Company have not applied and presently do not apply on traffic handled over the last named facility.

V

That the defendants, by the provisions of tariffs referred to in paragraph IV above and the Norfolk and Portsmouth Belt Line Railroad Company Tariff 6-J, I. C. C. No. 105,

262 provides generally for an allowance to the operators of said terminal facilities at Norfolk, Virginia, including the Transport, Trading and Terminal Corporation, the Lincoln Tidewater Terminals, Incorporated, and Lambert's Point Docks, Incorporated, of one cent per 100 pounds wharfage and three cents per 100 pounds handling for furnishing the facilities and performing the services on shipments of export, import, intercoastal, and coastwise traffic handled at those terminal facilities. Lincoln Tidewater Terminals, Incorporated, operates United

Nations Depot No. 9 under an operating contract with the Army Air Corps. The traffic handled consists principally of Army Air Corps and lend-lease material. Under the terms of the said contract Lincoln Tidewater Terminals, Incorporated, as contractor, furnishes the supervision and management of the operations of the terminal facilities and collects and accounts for all charges imposed by the Government upon the use of the facilities.

VI

That prior to June 15, 1942, the Transport, Trading and Terminal Corporation had been operating the facilities, identified as Army Base Piers Nos. 1 and 2, under a lease from the United States Maritime Commission. It was the practice and custom of the defendants to utilize the facilities and services of the Transport, Trading and Terminal Corporation for the loading and unloading of water-borne traffic moving over the aforesaid piers and to pay it as such terminal operator the sum of one cent per 100 pounds wharfage and three cents per 100 pounds for handl-
263 ing services. On June 15, 1942, because of war-time requirements and the increased volume of military and related traffic requiring precedence, the War Department assumed the control and operation of the said facilities. They have been and are available and are used for the handling of traffic of the United States of America and, subject to priorities for military requirements, of private shippers. The operations conducted by the War Department at these facilities have been and are substantially the same as the operations previously conducted by the Transport, Trading and Terminal Corporation.

VII

That military demands require, and the defendants herein are under a duty to provide, that military traffic be given precedence and that it be handled at the largest and best equipped water terminals, with due regard to berthing space, the proximity to the piers of adequate warehousing facilities, sources of labor supply, military security, and flexibility to meet the contingency of unforeseen changes in planned schedules.

VIII

That for much of the period since June 15, 1942, the terminal facilities at Norfolk, Virginia, exclusive of Army Base Piers Nos. 1 and 2, have been and they now are incapable of handling the increased volume of War Depart-

ment and other governmental and commercial water-borne traffic that has been and is being moved over Army
264 Base Piers Nos. 1 and 2. The defendants do not themselves operate terminal facilities for handling general cargo at Norfolk, and could not have handled over pier facilities at Norfolk other than Army Base Piers Nos. 1 and 2 any substantial part of the traffic that has moved over said Army piers since June 15, 1942. They were not and are not now in a position to fulfill their transportation obligations with respect to handling and wharfage to and from shipside on the above-described traffic moving over Army Base Piers Nos. 1 and 2.

IX

That since the assumption by the War Department of the control and operation of the terminal facilities identified as Army Base Piers Nos. 1 and 2, the defendants, though often requested and subjected to demands by the War Department, have nevertheless failed, neglected and refused, and still fail, neglect and refuse, to furnish the facilities and perform the services required and necessary to effect the shipside delivery or receipt at those facilities of shipments of export or import traffic which are transported under rates that specifically include shipside delivery or receipt or which originate at or are destined to points in so-called "absorption territory," as described in paragraph IV hereof; or in lieu thereof, to grant complainant an allowance for wharfage and handling; or to amend their terminal tariffs to designate the United States as the recipient of the allowances made to the former operator of the said piers; or, in the alternative, to publish separate charges for wharfage and handling, with a
265 corresponding reduction in the line-haul rates. The War Department, by reason of the failure, neglect, and refusal of the defendants to furnish the facilities and perform the services on said traffic at these piers, or to make an allowance therefor, has been and is presently compelled and required to furnish the facilities and perform the services at the expense of the United States for such War Department and other governmental and commercial water-borne traffic, notwithstanding the defendants' obligation therefor under the applicable published line-haul rates.

X

That for many years it has been the general practice and custom of the defendants, as reflected in existing tariff provisions now maintained by them, to furnish the facil-

ities and perform the services necessary to effect shipside delivery or receipt at Norfolk, Virginia, and other North Atlantic ports under their line-haul rates on shipments of export, import, intercoastal, and coastwise traffic; or to compensate the terminal operators who furnish the facilities and perform the services. No adjustment was made in the line-haul rates applicable to and from Norfolk, Virginia, at the time when the control and operation of the facilities of Transport, Trading and Terminal Corporation were assumed by the War Department on June 15, 1942, nor has any such adjustment since been made.

XI

That the failure, neglect and refusal of the defend-
266 ants to furnish the facilities and perform the services at the Army Base Piers Nos. 1 and 2, or to compensate the United States of America by means of an allowance for furnishing the facilities and performing the services is a departure from the general practice and custom of the defendants, and in violation of the provisions of applicable tariffs. Accordingly, the United States of America has been and is being required to pay transportation charges on the basis of rates which provide for such services and, at the same time, to furnish the facilities and perform the services at its own expense. Such requirements were and are not imposed upon other shippers of like traffic which is handled over the United Nations Depot No. 9, the facilities of the Lambert's Point Docks, Incorporated, and other terminals located at Norfolk, Virginia, and other North Atlantic ports. By means of said requirements complainant has been subjected to greater charges than are demanded from other shippers for like services in the transportation of like traffic under similar conditions. The United States of America has been and is being compelled to furnish the facilities and perform the services for both governmental and commercial water-borne traffic moving over Army Base Piers Nos. 1 and 2 at its own expense without any allowances therefor from the defendants.

XII

That the War Department has attempted to obtain a voluntary and satisfactory adjustment by the defendants of the matters concerning which complaint is made
267 herein, but such efforts have not been successful and defendants have failed and refused to make any adjustment.

Gulf Coast Lines, comprising the following carriers:
The Beaumont, Sour Lake & Western Railway Company (Guy A. Thompson, Trustee);
Brownsville & Matamoros Bridge Company;
New Iberia & Northern Railroad Company (Guy A. Thompson, Trustee);
276 New Orleans, Texas & Mexico Railway Company (Guy A. Thompson, Trustee);
The Orange & Northwestern Railroad Company (Guy A. Thompson, Trustee);
The St. Louis, Brownsville and Mexico Railway Company (Guy A. Thompson, Trustee);
Gulf, Colorado and Santa Fe Railway Company;
Gulf, Mobile and Ohio Railroad Company;
Hampton & Branchville Railroad Company;
Helena Southwestern Railroad Company;
High Point, Randleman, Asheboro and Southern Railroad Company;
High Point, Thomasville & Denton Railroad Company;
Houston and Brazos Valley Railway Company (Guy A. Thompson, Trustee);
Illinois Central Railroad Company;
Illinois Terminal Railroad Company;
Indiana Harbor Belt Railroad Company;
International-Great Northern Railroad Company (Guy A. Thompson, Trustee);
Interstate Railroad Company;
The Ironton Railroad Company (Lehigh Valley Railroad Company and Reading Company, Lessees);
Jacksonville, Gainesville & Gulf Railway;
Jamestown, Westfield and Northwestern Railroad Company;
The Joplin-Pittsburg Railroad Company;
Kansas City, Kaw Valley Railroad, Inc.;
The Kansas City Southern Railway Company;
Kansas, Oklahoma & Gulf Railway Company;
Kewaunee, Green Bay and Western Railroad Company;
Lackawanna and Wyoming Valley Railroad Company;
Lake Erie, Franklin & Clarion Railroad Company;
The Lakeside and Marblehead Railroad Company;
Lake Superior & Ishpeming Railroad Company;
277 Lancaster and Chester Railway Company;
Lauriuburg and Southern Railroad Company;
The Lehigh and Hudson River Railway Company;
Lehigh and New England Railroad Company;
Lehigh Valley Railroad Company;
Litchfield and Madison Railway Company;

Live Oak, Perry & Gulf Railroad Company;
The Long Island Rail Road Company;
The Lorain & West Virginia Railway Company;
Louisiana & Arkansas Railway Company;
The Louisiana and North West Railroad Company;
Louisville and Nashville Railroad Company;
Macon, Dublin & Savannah Railroad Company;
Maine Central Railroad Company;
Manistee and Northeastern Railway Company;
Manistique and Lake Superior Railroad Company;
The Mansfield Railway & Transportation Company;
Marinette, Tomahawk & Western Railroad Company;
Maryland and Pennsylvania Railroad Company;
McCloud River Railroad Company;
Meridian and Bigbee River Railway Company (J. G. Floyd, Trustee);
Middletown and Unionville Railroad Company;
Midland Continental Railroad;
Midland Valley Railroad Company;
The Milwaukee Electric Railway & Transport Company;
Mineral Range Railroad Company (Edward A. Whitman & P. L. Solether, Trustees);
The Minneapolis & St. Louis Railroad Corporation;
The Minneapolis & St. Louis Railway Company;
Minneapolis, Northfield and Southern Railway;
Minneapolis, St. Paul & Sault Ste. Marie Railway Company (G. W. Webster and Joseph Chapman, Trustees);
Minnesota, Dakota & Western Railway Company;
278 Minnesota Western Railway Company;
Mississippi Central Railroad Company;
Mississippi Export Railroad Company;
Missouri and Arkansas Railway Company;
Missouri-Illinois Railroad Company (Guy A. Thompson, Trustee);
Missouri-Kansas-Texas Railroad Company;
Missouri-Kansas-Texas Railroad Company of Texas;
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee);
Missouri Pacific Railroad Corporation in Nebraska (Guy A. Thompson, Trustee);
The Mobile & Gulf Railroad Company;
The Monongahela Railway Company;
Montour Railroad Company;
Montpelier and Wells River Railroad;
Morristown & Erie Railroad Company;
Murfreesboro-Nashville Railway Company (V. B. Lewis, Receiver);

XIII

That by reason of the facts stated in the foregoing paragraphs, the United States of America has been, is, and will be subjected to the payment of rates and charges for transportation which were when exacted, still are, and will continue to be unjust and unreasonable in violation of section 1 (5) (a) and section 1 (6) of the Interstate Commerce Act; and unjustly discriminatory in violation of section 2 of the Interstate Commerce Act; and unduly prejudicial to military traffic and not in full compliance with section 6 (8) of the Interstate Commerce Act; and excessive and without any allowance to the owner for the use of its instrumentalities in transportation and for its rendition of services connected with transportation, in violation of section 15 (13) of the Interstate Commerce Act.

XIV

That complainant has been injured thereby to its damage in a sum of money the exact amount of which is not presently ascertainable.

Wherefore, complainant prays that defendants, and each of them, be required to answer the charges herein; and that after due hearing and investigation the Commission:

(a) issue an order commanding the defendants, and each of them,

268 (1) to cease and desist from the aforesaid violations of said act;

(2) to establish and pay in the future to the complainant an allowance for wharfage and handling in such amount as the Commission shall deem to be just and reasonable compensation for furnishing the facilities and performing the services at Army Base Piers Nos. 1 and 2 on shipments of export, import, intercoastal and coastwise traffic transported under rates which include such services, either by specific designation as "shipside" rates or by the application of the absorption provisions published in the terminal tariffs referred to in paragraph IV hereof; or, in the alternative, to establish and apply in the future separate wharfage and terminal charges for the services at Norfolk, Virginia, and corresponding reductions in the existing line-haul rates applicable on export, import, intercoastal, and coastwise traffic to and from Norfolk, Virginia; and

(3) to pay to complainant by way of reparation for the unlawful charges hereinbefore alleged and for fur-

nishing the facilities and performing the terminal services for defendants on past shipments and shipments during the pendency of this proceeding of export, import, intercoastal and coastwise traffic handled over Army Base Piers Nos. 1 and 2 in such amount, with interest thereon, as in view of the evidence to be adduced herein the Commission shall determine complainant is entitled to receive as an award of damages under the provisions of the Interstate Commerce Act on account of the violations thereof by the defendants.

269 (b) issue such other and further order or orders as the Commission may consider proper in the premises.

Dated at Washington, D. C., April 14, 1944.

FRANCIS M. SHEA,
Assistant Attorney General.

COUNTY OF ARLINGTON, }
State of Virginia. } ss.:

Colonel Luke W. Finlay, being duly sworn, deposes and says:

That he is the Executive Officer to the Chief of Transportation, Headquarters, Army Service Forces; that he has read the foregoing complaint and knows the contents thereof; that the same are true as stated except as to matters and things, if any, stated to be on information and belief, and as to those matters and things, he believes them to be true.

Deponent further says that the reason why this verification is made by the deponent and not by the complainant is because the complainant is a sovereign power.

LUKE W. FINLAY,
Colonel, Transportation Corps.

Subscribed in my presence, and sworn to before me by the deponent above named this 14th day of April 1944.

CLIFFORD STARR,
Colonel, Transportation Corps,
Summary Court.

270 *Appendix A*

LIST OF DEFENDANTS

Aberdeen and Rockfish Railroad Company;
Abilene & Southern Railway Company;

The Ahnapee and Western Railway Company;
The Akron, Canton & Youngstown Railroad Company;
The Alabama Great Southern Railroad Company;
Alabama, Tennessee & Northern Railroad Corporation (John T. Cochrane, Jr., Trustee);
Albany and Northern Railway Company;
Algers, Winslow and Western Railway Company;
Alton and Southern Railroad;
The Alton Railroad Company (Henry A. Gardner, Trustee);
Angelina & Neches River Railroad Company;
The Ann Arbor Railroad Company;
Apalachicola Northern Railroad Company;
Arcade and Attica Railroad Corporation;
Arkansas & Louisiana Missouri Railway Company;
The Arkansas Western Railway Company;
Aroostook Valley Railroad Company;
Ashley, Drew & Northern Railway Company;
The Atchison, Topeka and Santa Fe Railway Company;
Atlanta & Saint Andrews Bay Railway Company;
Atlanta and West Point Rail Road Company;
Atlanta, Birmingham and Coast Railroad Company;
The Atlantic and East Carolina Railway Company;
Atlantic and Western Railway Company;
Atlantic and Yadkin Railway Company;
271 Atlantic Coast Line Railroad Company;
The Baltimore and Annapolis Railroad Company;
Baltimore and Eastern Railroad Company;
The Baltimore and Ohio Chicago Terminal Railroad Company;
The Baltimore and Ohio Railroad Company;
Bamberger Railroad Company;
Bangor and Aroostook Railroad Company;
Bauxite & Northern Railway Company;
Bay Point and Clayton Railroad Company;
The Beaumont, Sour Lake & Western Railway Company (Guy A. Thompson, Trustee);
Beaver, Meade and Englewood Railroad Company;
The Belt Railway Company of Chicago;
Bennettsville and Cheraw Railroad Company;
Bessemer and Lake Erie Railroad Company;
Bingham and Garfield Railway Company;
Blue Ridge Railway Company;
Bonhomie and Hattiesburg Southern Railroad Company;
Boston and Maine Railroad;
Buffalo, Union-Carolina Railroad;

Burlington-Rock Island Railroad Company;
Butte, Anaconda & Pacific Railway Company;
Cadiz Railroad Company;
California Western Railroad & Navigation Company;
Camas Prairie Railroad Company;
Cambria and Indiana Railroad Company;
Canton & Carthage Railroad Company;
Cape Fear Railways, Inc.;
Carolina and Northwestern Railway Company;
Carolina, Clinchfield and Ohio Railway;
Carolina, Clinchfield and Ohio Railway of South Carolina
Lessees:
Atlantic Coast Line Railroad Company;
Louisville and Nashville Railroad Company;
272 Cedar Rapids and Iowa City Railway;
Central California Traction Company;
Central Indiana Railway Company;
Central of Georgia Railway Company (M. P. Callaway, Trustee);
The Central Railroad Company of New Jersey, (Shelton Pitney and Walter P. Gardner, Trustees);
Central Vermont Railway, Inc.;
Charles City Western Railway Company;
Charleston & Western Carolina Railway Company;
Chattahoochee Valley Railway Company;
The Chesapeake and Ohio Railway Company;
Chesapeake Western Railway;
Chestnut Ridge Railway Company;
Cheswick and Harmar Railroad Company;
Chicago & Eastern Illinois Railroad Company;
Chicago & Illinois Midland Railway Company;
Chicago & Illinois Western Railroad;
Chicago and North Western Railway Company (Claude A. Roth, Trustee);
Chicago, Attica & Southern Railroad Company (William Fabrikant, Agent);
Chicago, Aurora and Elgin Railroad Company (A. A. Sprague and Bernard J. Fallon, Receivers);
Chicago, Burlington & Quincy Railroad Company;
Chicago Great Western Railway Company;
Chicago, Indianapolis and Louisville Railway Company (L. F. DeRamus and Holman D. Pettibone, Trustees);
Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees);

Chicago, North Shore and Milwaukee Railroad Company (John B. Gallagher and Edward J. Quinn, Trustees);
273 The Chicago River and Indiana Railroad Company;
The Chicago, Rock Island and Pacific Railway Company (Aaron Colnon and Joseph B. Fleming, Trustees);
Chicago, Saint Paul, Minneapolis and Omaha Railway Company;
Chicago South Shore and South Bend Railroad;
Chicago, West Pullman & Southern Railroad Company;
The Cincinnati, New Orleans and Texas Pacific Railway Company;
The Colorado and Southeastern Railroad Company;
The Colorado and Southern Railway Company;
The Colorado & Wyoming Railway Company;
Columbia, Newberry and Laurens Railroad Company;
Columbus and Greenville Railway Company;
Copper Range Railroad Company;
Cornwall Railroad Company;
Coudersport and Port Allegany Railroad Company;
Cowlitz, Chehalis & Cascade Railway;
Cumberland and Pennsylvania Railroad Company;
Danville and Western Railway Company;
The Delaware and Hudson Railroad Corporation;
The Delaware, Lackawanna and Western Railroad Company;
The Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees);
The Denver and Salt Lake Railway Company;
DeQueen and Eastern Railroad Company;
Des Moines & Central Iowa Railroad;
Detroit and Mackinac Railway Company;
The Detroit and Toledo Shore Line Railroad Company;
274 Detroit, Caro and Sandusky Railway Company;
Detroit, Toledo and Ironton Railroad Company;
Doniphan, Kensett & Searcy Railway;
Duluth & Northeastern Railroad Company;
Duluth, Missabe and Iron Range Railway Company;
The Duluth, South Shore and Atlantic Railway Company (Edward A. Whitman and P. L. Solether, Trustees);
Duluth, Winnipeg and Pacific Railway Company;
Durham and Southern Railway Company;
Eastland, Wichita Falls & Gulf Railroad Company;
East St. Louis Junction Railroad Company;
Elgin, Joliet and Eastern Railway Company;
Erie Railroad Company;

Escanaba and Lake Superior Railroad Company;
Fernwood, Columbia & Gulf Railroad Company;
Flint River and Northeastern Railroad Company;
Florida East Coast Railway Company (Scott M. Loftin and John W. Martin, Trustees);
Fonda, Johnstown and Gloversville Railroad Company (Judson Zimmer, Trustee);
Fordyce and Princeton R. R. Co.;
Fort Dodge, Des Moines & Southern Railway Company;
Fort Worth and Denver City Railway Company;
Frankfort & Cincinnati Railroad Company;
Gainesville Midland Railroad Company;
Galveston, Houston and Henderson Railroad Company;
Genesee and Wyoming Railroad Company;
Georgia & Florida Railroad (W. V. Griffin and H. W. Purvis, Receivers);
Georgia, Ashburn, Sylvester & Camilla Railway Company;
275 The Georgia Northern Railway Company;
Georgia Rail Road & Banking Company, Operated as the Georgia Railroad by Lessees:
Atlantic Coastline Railroad Company;
Louisville and Nashville Railroad Company;
Georgia Southern and Florida Railway Company;
Grafton and Upton Railroad Company;
Grand Trunk Railway System (Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers:
Canadian National Railway Company;
The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee);
The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee);
Grand Trunk Railway System (Lines west of Detroit and St. Clair Rivers) comprising the following carriers:
Grand Trunk Western Railroad Company;
Cincinnati, Saginaw and Mackinaw Rail Road Company (Grand Trunk Western Railroad Company, Lessee);
Grand Trunk Western Railroad Company;
Graysonia, Nashville & Ashdown Railroad Company;
Great Northern Railway Company;
The Great Western Railway Company;
Green Bay and Western Railroad Company;
Gulf and Ship Island Railroad Company;

The Nachogdoches & Southeastern Railroad Company;
The Nashville, Chattanooga & St. Louis Railway;
Nelson & Albemarle Railway Company;
Nevada Northern Railway Company;
New Iberia & Northern Railroad Company (Guy A. Thompson, Trustee);
The New Jersey and New York Railroad Company (Peter Duryee, Trustee);
New Jersey, Indiana & Illinois Railroad Company;
New Orleans and Lower Coast Railroad Company;
New Orleans and Northeastern Railroad Company;
New Orleans, Texas & Mexico Railway Company (Guy A. Thompson, Trustee);
The New York and Long Branch Railroad Company;
The New York Central Railroad Company;
The New York, Chicago and St. Louis Railroad Company;
279 The New York Connecting Rail Road Company;
The New York, New Haven and Hartford Railroad Company (Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees);
New York, Ontario and Western Railway Company (Frederic E. Lyford, Trustee);
New York, Susquehanna and Western Railroad Company (Henry K. Norton, Trustee);
Norfolk and Portsmouth Belt Line Railroad Company;
Norfolk and Western Railway Company;
Norfolk Southern Railway Company;
Normetal Railway Company;
Northampton and Bath Railroad Company;
Northeast Oklahoma Railroad Company;
Northern Pacific Railway Company;
North Louisiana & Gulf Railroad Company;
Northwestern Pacific Railroad Company;
The Ohio Public Service Company;
Oklahoma City-Ada-Atoka Railway Company;
Oklahoma Railway Company (Robt. K. Johnston, A. C. DeBolt, Trustees);
The Orange & Northwestern Railroad Company (Guy A. Thompson, Trustee);
Oregon Electric Railway Company;
Oregon Trunk Railway;
Osage Railway Company;
Pacific Coast R. R. Co.;
Pacific Electric Railway Company;
Paducah & Illinois Railroad Company;
Panhandle and Santa Fe Railway Company;

Paris and Mt. Pleasant Railroad Co.;
Pennsylvania and Atlantic Railroad Company;
280 Pennsylvania and Atlantic Railroad Company (South of Hightstown, N. J., to Pemberton, N. J., Inc.)
(The Union Transportation Company, Lessee);
The Pennsylvania Railroad Company;
Pennsylvania-Reading Seashore Lines;
Pere Marquette Railway Company;
Piedmont and Northern Railway Company;
The Pittsburg & Shawmut Railroad Company;
Pittsburgh County Railway Company;
The Pittsburgh and Lake Erie Railroad Company;
The Piftsburgh & West Virginia Railway Company;
The Pittsburgh, Lisbon & Western Railroad Company;
The Pittsburgh, Shawmut & Northern Railroad Company (John D. Dickson, Receiver);
Port Huron and Detroit Railroad Company;
Port Townsend Southern Railroad Company;
The Potomac Edison Company;
The Prescott and Northwestern Railroad Company;
Quanah, Acme & Pacific Company;
Rahway Valley Company (Rahway Valley Company, Lessee);
Rapid City, Black Hills & Western Railroad Company;
Reading Company;
Richmond, Fredericksburg and Potomac Railroad Company;
Rockingham Railroad Company;
Rock Island Southern Railway Co.;
Roscoe, Snyder and Pacific Railway Company;
Rutland Railroad Company (W. E. Navin, Receiver);
Sabine & Neches Valley Railway Company;
Sacramento Northern Railway;
St. Francois County Railroad Company;
St. Louis & Belleville Electric Railway Company;
St. Louis and Hannibal Railroad Company;
281 The St. Louis and O'Fallon Railway Company;
St. Louis and Ohio River Railroad;
The St. Louis, Brownsville and Mexico Railway Company (Guy A. Thompson, Trustee);
St. Louis, San Francisco and Texas Railway Company;
St. Louis-San Francisco Railway Company (J. M. Kurn & Frank A. Thompson, Trustees);
St. Louis Southwestern Railway Company of Texas (Berryman Henwood, Trustee);

St. Louis Southwestern Railway Company (Berryman Henwood, Trustee);
The Salt Lake & Utah Railroad Corporation;
San Antonio Southern Railway Company (Guy A. Thompson, Trustee);
San Antonio, Uvalde & Gulf Railroad Company (Guy A. Thompson, Trustee);
San Benito and Rio Grande Valley Railway Company (Guy A. Thompson, Trustee);
San Diego & Arizona Eastern Railway Company;
Sand Springs Railway Company;
Savannah & Atlanta Railway Company;
Seaboard Air Line Railway Company (L. R. Powell, Jr., and Henry W. Anderson, Receivers);
Southern Iowa Railway Company;
Southern Pacific Company;
Southern Railway Company;
The South Georgia Railway Company;
Spokane International Railroad Company;
Spokane, Portland and Seattle Railway Company;
Springfield & Southwestern Railroad Company;
The Staten Island Rapid Transit Railway Company;
Statesboro Northern Railway (Georgia & Florida Railroad, W. V. Griffin and H. W. Purvis, Receivers, Lessee;
282 Sugar Land Railway Company (Guy A. Thompson, Trustee);
Sumter and Choctaw Railway Company;
Tennessee, Alabama & Georgia Railway Company;
Tennessee Central Railway Company;
Texas and New Orleans Railroad Company;
The Texas and Pacific Railway Company;
Texas Electric Railway Company;
The Texas Mexican Railway Company;
Texas Short Line Railway Company;
Texas South-Eastern Railroad Company;
Toledo, Peoria & Western Railroad (Holly Stover, Federal Manager);
Tremont & Gulf Railway Company;
Trenton-Princeton Traction Company;
Tulsa-Sapulpa Union Railway Company;
Unadilla Valley Railway Company;
The Union Electric Railway Company;
Union Pacific Railroad Company;
United Electric Railways Company;
The Utah Idaho Central Railroad Corporation;
Utah Railway Company;
The Virginian Railway Company;

Wabash Railroad Company;
Waco, Beaumont, Trinity & Sabine Railway Company (Paul T. Sanderson, Receiver);
Warren & Quachita Valley Railway Company;
Washington and Old Dominion Railroad;
Washington, Idaho & Montana Railway Company;
Waterloo, Cedar Falls and Northern Railway Company (C. M. Cheney, Receiver);
Western Maryland Railway Company;
The Western Pacific Railroad Company (T. M. Shumacher and Sidney M. Ehrman, Trustees);
The Western Railway of Alabama;
Wharton and Northern Railroad Company;
283 The Wheeling and Lake Erie Railway Company;
Wichita Falls & Southern Railroad Company;
The Wichita Valley Railway Company;
The Winona Railroad Co.;
Winston-Salem Southbound Railway Company;
Wrightsville and Tennille Railroad Company;
Yadkin Railroad Company;
The Yazoo and Mississippi Valley Railroad Company;
The Youngstown and Suburban Railway Company.

1 Before The Interstate Commerce Commission

Docket No. 29117

UNITED STATES OF AMERICA, COMPLAINANT

v.

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., DEFENDANTS

Reporter's transcript of hearing

Federal Building,
Norfolk, Virginia.
Tuesday, July 18, 1944.

Met, pursuant to notice, at 9:30 o'clock a. m.
Before: W. A. DISQUE, *Examiner*.

APPEARANCES:

Donald B. MacGuineas, 3700 Massachusetts Avenue, Washington, D. C., appearing for United States.

Edward H. Cox, Major, J. A. G. D., Room 3725 Munitions Building, Washington, D. C., appearing for Secretary of War.

Windsor F. Cousins, 1740 Broad Street Station Building, Philadelphia 4, Pennsylvania, appearing for The Pennsylvania Railroad Company.

A. P. Donadio, 301 B & O Building, Baltimore, Maryland, appearing for Baltimore & Ohio Railroad, Defendant.

Charles P. Reynolds, 1110 Shoreham Building, Washington, D. C., appearing for Atlantic Coast Line Railroad Company and the Seaboard Airline Railway Company.

2 A. J. Dixon and C. W. Dilly, Southern Railway Building, 15th & K Streets, North West, Washington, D. C., appearing for the Southern Railway System Lines.

W. W. Wolford, 352 Seaboard Railway Building, Norfolk, Virginia, appearing for Seaboard Air Line Railway.

John C. Donnally, Investment Building, Washington, D. C., appearing for The Virginian Railway Company.

D. Lynch Younger, Law Department, Norfolk & Western Railway Company, Roanoke, Virginia, appearing for the Norfolk & Western Railway Company.

Lawrence Chaffee, 1500 First National Bank Building, Richmond, Virginia, appearing for The Chesapeake & Ohio Railway Company.

C. H. Ware, 221 Terminal Station, Norfolk, Virginia, appearing for the Norfolk-Southern Railway Company.

P. G. O'Neil and H. E. Ketner, appearing for State Corporation Commission of Virginia, State Office Building, Richmond 19, Virginia.

Arthur L. Winn, Jr., Investment Building, Washington, D. C., appearing for Port of New York Authority.

Edward K. Laux, appearing for The Port of New York Authority: 111 Eighth Avenue, New York, New York.

Charles R. Seal, 22 Light Street, Baltimore, Maryland, appearing for the Baltimore Association of Commerce, intervener.

H. J. Wagner, City Hall, Norfolk, Virginia, appearing
3 for Norfolk Port Traffic Commission.

Samuel H. Williams, 12th & Walnut Streets, Philadelphia, Pennsylvania, appearing for Chamber of Commerce and Board of Trade of Philadelphia.

R. D. Brooks, appearing for the New York Central Railroad Company.

5 PROCEEDINGS

Exam. DISQUE. The Interstate Commerce Commission has assigned for hearing here today Docket No. 29117, United States of America versus Aberdeen & Rockfish Railroad Company, *et al.*

Who appears for the complainant?

Mr. MacGuineas. Donald B. MacGuineas for the United States.

Mr. Cox. Edward H. Cox, Major, J. A. G. D., appearing for the Secretary of War.

Exam. Disque. Who appears for the defendant?

Mr. Cousins. Windsor F. Cousins for the Pennsylvania Railroad Company.

Mr. Reynolds. Charles P. Reynolds for the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railway Company.

Mr. Dixon. A. J. Dixon and C. W. Dilli for the Southern Railway System Lines.

Mr. Younger. D. Lynch Younger for the Norfolk & Western Railway Company.

Mr. Donnally. John C. Donnally for the Virginia Railway Company.

Mr. Chaffee. Lawrence Chaffee for the Chesapeake & Ohio Railway Company.

Mr. Donadio. A. P. Donadio for the Baltimore & Ohio Railway Company.

Mr. Ware. C. H. Ware, traffic manager, Norfolk-Southern Railway Company.

Mr. Brooks. R. D. Brooks for the New York Central Railroad Company.

Exam. Disque. Are there any intervenors in this case? I have not the docket here. Does any one desire to intervene at this time?

Mr. O'Neil. Powell G. O'Neil, for the State Corporation Commission of Virginia.

I do not have sufficient copies to go around, but I will be glad to prepare additional ones.

Exam. Disque. What position are you taking in this case?

Mr. O'Neil. Complainant seeks an allowance for wharfage and handling "either by specific designation as 'ship-side' rates or by the application of the absorption provisions published in the terminal tariffs referred to in paragraph IV (of the complaint); or, in the alternative, to establish and apply in the future separate wharfage and terminal charges for the services at Norfolk, Virginia, and corresponding reductions in the existing line-haul rates applicable on export, import, intercoastal, and coastwise traffic to and from Norfolk, Virginia.

The Virginia Commission is opposed to any action by the Interstate Commerce Commission in this proceeding that

would disturb the existing port rate adjustment and
7. practices. It is opposed to separate line-haul and
terminal charges and favors a continuation of the line-haul rates applying to and from "shipside" at Norfolk.

We reserve the right of developing our position more fully on brief or exceptions if it seems desirable for us to do so.

Exam. DISQUE. I take it then you are opposing the complaint?

Mr. O'NEIL. That is right.

Exam. DISQUE. Does any one else desire to file an intervening petition?

Mr. WINN. Yes. I offer petition for leave to intervene on behalf of the Port of New York Authority. I have handed you the original and I have copies for all the parties present.

The petition does not broaden the issues.

The position of the intervener is that it is opposed to separation of the line-haul rate and other terminal and line-haul factors. As to the other prayers of the complaint, aside from the alternative prayer just referred to, the intervener takes no position.

Exam. DISQUE. Does anyone else desire to intervene?

Mr. SEAL. Charles R. Seal on behalf of the Baltimore Association of Commerce. On behalf of the Port of Baltimore, I should like to intervene at this time.

Mr. Examiner, I have supplied the original of our
8. petition to the reporter and have copies for distribution.

Our position would be substantially the same as that of Mr. Winn for the Port of New York Authority.

Mr. WILLIAMS. Samuel H. Williams. I have a petition on behalf of the Chamber of Commerce and Board of Trade of Philadelphia, which does not broaden the issue and our position will be substantially the same as that stated by Mr. Winn. I have copies for counsel, you having the original.

Exam. DISQUE. Does anyone else desire to intervene?

(No response.)

Exam. DISQUE. Are there any preliminaries before we proceed with the evidence?

Mr. WINN. Does the record show, your Honor, the ruling on our petitions for leave to intervene?

Exam. DISQUE. If there is no undue broadening of the issues, the petitions will be allowed, and I assume there is no undue broadening of the issues.

You may proceed, Mr. MacGuineas.

JOHN REED KILPATRICK was sworn and testified as follows.

Direct Examination.

Q. (By Mr. MACGUINEAS): State your name and rank.

A. John Reed Kilpatrick, Brigadier-General, Commanding the Hampton Roads Port of Embarkation.

Q. You are the commanding officer of the Hampton Roads Port of Embarkation?

A. Yes, sir.

Q. When did you assume the command of the Port of Embarkation?

A. Upon activization of the Port on the 15th of June, 1942, and prior thereto for about a month I was in command of the sub-port of Norfolk which operated under the New York Port of Embarkation.

Q. What area is embraced within the Port of Embarkation?

A. The Hampton Roads area covers specifically the Army Base at Norfolk, the Sewalls Point facility at Norfolk, the C & O piers at Newport News and all auxiliary installations, such as the staging area at Camp Patrick Henry, the Kecoughtan Hospital, and so forth.

Q. When you refer to the Army Base at Norfolk, are you specifically referring to what are known as army base Piers 1 and 2?

A. Yes, sir, and the back-up storage incidental thereto.

Q. What about the property commonly known as United Nations Depot?

A. That is now operated for export deep sea loading by the Port of Embarkation, but the facilities are used generally by the Air Corps as an in-transit depot as well.

Q. Is the United Nations Depot also under your command?

A. No.

Q. Can you explain generally the circumstances and occasions under which it was determined to establish the Port of Embarkation at Norfolk?

A. Yes, sir. With the rapid building up of our forces over seas, it was obvious that all of the east coast deep water facilities would be required to supply our troops as their numbers built up.

The Army had a port of embarkation in operation in New York, one in Boston, and one in Charleston, but it was obvious that there would not be sufficient capacity to take care of our requirements.

So a Port of Embarkation was established here at Hampton Roads. Now the Port of Hampton Roads is second only to New York in the amount of freight that it ships. In fact, it is the third in the country. San Francisco exceeds it slightly.

Q. Can you state whether any considerations of military emergency were involved in the determination to set up the port of embarkation?

A. Yes, sir. It was decided to have a port of embarkation work in conjunction with the large naval installations in Hampton Roads in connection with the amphibious training of our troops and the expedition of task forces and so forth; and also it was very desirable to have all our facilities developed to the end that if an accident occurred in New York or Boston or some other large port, the flow of army freight would not be interrupted.

11 Since Hampton Roads was activated, both Baltimore and Philadelphia have been established as cargo ports of embarkation and Searsport, Maine also.

Q. Were any considerations with respect to the prevention of sabotage and spying involved in the determination to establish the port of embarkation?

A. Not exactly except that our facilities were scattered so that one act of sabotage, one accident, one fire, one catastrophe in a large port would not handicap to an undue extent the shipment of troops and supplies overseas.

Q. Can you state generally the volume of traffic that has been and is now being handled over army base Piers 1 and 2?

A. I do not want to give specific figures on that for reasons of security, but roughly one-half of the Army freight which is dispatched from Hampton Roads moves over Army Base Piers 1 and 2. In the overall picture, Hampton Roads is second only to New York. It exceeds by substantial margins Philadelphia, Baltimore, Charleston, and Boston. Is that sufficiently specific? It is in the hundreds of thousands of tons.

Q. Per what period of time?

A. Per month.

Q. That is sufficient. Again, without being too specific, can you indicate what type of traffic moves over the Army Base Piers 1 and 2?

A. Everything that the Army needs and uses—food, ammunition, Quartermaster supplies, Engineer sup-

12 plies, Lend-Lease supplies, vehicles, guns, tanks—

everything that the Army uses I think we have shipped over these piers, every type of supply.

Q. Since you have assumed command of the port of embarkation, has there been any movement of commercial traffic over Army Base Piers 1 and 2?

A. Yes, sir.

Q. By "commercial traffic," I mean non-governmental traffic.

A. Yes.

Q. Can you give us a general picture of the commercial traffic movement?

A. Well, the incoming movement has been limited chiefly to ore of various types and categories. The outgoing movement has been cement, billets, wire, clothing, and so forth.

Q. Do you still permit the use of Army Base Piers 1 and 2 for the movement of commercial traffic?

A. Yes, in so far as the shipments do not interfere with our straight Army requirements. Whenever they can be worked in without handicapping the Army shipments, I have permitted commercial shipments.

Q. Does the Norfolk and Portsmouth Belt Line place the cars on the tracks on Army Base Piers 1 and 2?

A. Yes, sir.

Q. Since you assumed command of the port, have the carriers been making any shipside delivery at Army Base Piers 1 and 2?

13 A. No.

Q. Just what services have the carriers been performing since June 15, 1942, with reference to the delivery of traffic at those Army Piers?

A. They deliver the cars. The Belt Line delivers the cars, but from that point on the Army would handle the unloading of the cars on to the piers and so forth.

Q. When did the Army begin to unload the cars to the pier floor?

A. About the 15th of June, about the date of activization of the port. I am not sure of the exact date but it was the first ship that was speeded up for Army loading after that day.

Q. Why did the Army then assume the function of unloading cars from the pier tracks on to the floor?

A. When the Army took over on June 15, Army Base Piers 1 and 2, at the same time it took over the existing organization, the existing operating organization of the Terminal Transport and Trading Company that had been fulfilling this function for the railroads and the situation continued just as it had. The same men that had been unload-

ing the cars for the railroad unloaded the cars for the Army, under the same supervisory force. Then gradually as shortages of labor developed, we put soldiers in unloading the cars when necessary.

Q. At the time you assumed command of the port; did you refuse to allow the carriers to unload the cars at the piers?

14 A. No.

Q. At any time after you assumed command, did they offer to continue their service of unloading the cars at the piers?

A. No.

Q. Who is now assuming the burden of the cost of unloading the cargo from the cars on to the pier floor for shipside delivery?

A. The Army.

Q. Can you indicate generally what elements of cost are involved in the performance of that service?

A. The actual labor costs involved in the main are the men who actually unload the cars, the cost of checkers and the supervisory force, and all of the incidental costs that are a little difficult to segregate, as, for example, the keeping of the piers clean, the keeping of proper fire protection, and fire guards. How much of that is involved in the cost of unloading and how much would be normal maintenance is a little difficult to segregate.

Q. Is the actual unloading of the cars performed by civilian labor at this time?

A. Yes, to the extent that civilian labor is available in surplus to meet our peaks. We throw in troops in a few cases and we have used stevedores, too.

Q. Where do you get the civilian labor that is ordinarily used for unloading the cars?

A. We took over the labor force of the Transport

15 Terminal and Trading Company. We get our civilian labor in the same way that other terminals do, from the local supply.

Q. Is the use of any equipment involved in the unloading of cars on to the pier floors?

A. Well, due to the shortage of labor and due to the scarcity of labor, we have been forced to use cargo handling equipment, lift trucks, trailers and so forth to the maximum in order to overcome the shortage of labor.

Q. Who owns the equipment that is used for that purpose?

A. The government, the War Department.

Q. Who is paying for its maintenance and operation?

A. The War Department.

Q. Who assumes the burden of depreciation and maintenance cost of the piers themselves?

A. Of Piers 1 and 2? The government.

Q. Since you have had command of the port, have you ever refused the carriers permission to unload the cars onto the pier floors for shipside delivery?

A. No.

Q. What about the converse of the situation, the traffic coming from ship to car? Who performs the service of loading from the pier floor into the car?

A. The Army does that. When ore is handled—that is, when incoming ore is handled, the commercial interests have handled that.

16 Q. If the import is commercial traffic?

A. If it is commercial traffic, yes. On all government freight, both in and out, the Army handles the whole thing.

Q. Did you ever make demand on the carriers to perform the service of unloading the cars to the pier floor, and, conversely, from the pier floor to the cars?

A. Yes; to do that or grant us credit for lieu thereof.

Q. Do you have an exhibit which contains the correspondence to and from the government and the carriers with reference to your demand and the carriers replied in connection with the performance of unloading services at the Army Base Piers?

A. Yes.

Mr. MacGuineas. May this be marked for identification?

Exam. Disque. Yes.

(Complainant's Exhibit 1, Witness Kilpatrick, marked for identification.)

Q. (By Mr. MacGuineas). General Kilpatrick, I will show you this map and ask you if that is a correct representation of the Norfolk Harbor area and the pier facilities.

A. Yes.

Mr. MacGuineas. May this be marked Complainant's Exhibit No. 2 for identification?

Exam. Disque. Yes.

(Complainant's Exhibit 2, Witness Kilpatrick, marked for identification.)

17 Q. (By Mr. MacGuineas). If the carriers were willing to perform the service of unloading the cars from the pier track on to the floor of the pier and the con-

verse, load from the floor on to the cars, would you permit them to perform that service?

A. Yes, subject to the ordinary rules of security. We would have to screen their employees, we would have to keep in effect certain rules as regards safety, fire, cleanliness and so forth, that are considerably more stringent than are the customs in commercial practice, but that is merely due to the nature of our work.

Q. Would you permit the carriers to perform that service with the same force of civilian labor that is now being used by the Army?

A. Yes. I would like to point out, though, that the civilian force is entirely inadequate and has to be supplemented by large gangs of men from time to time as we hit our peak loads.

Q. But to the extent that the carriers might be able to provide civilian labor for performing that service, would you allow them to do it?

A. Yes.

Exam. DISQUE. Right there, may I ask a question?

Suppose that civilian labor was insufficient, what would you expect the railroads to do?

18 The WITNESS. I would have to meet that situation by the use of troops.

Exam. DISQUE. You would?

The WITNESS. Yes, the point being that our convoys must move, our freight must move. We can not advise the overseas theatre: "We are sorry, we can not send you food because the railroads have a shortage of labor to unload cars at the Army Base Piers."

Q. (By Mr. MACGUINEAS). Will you describe briefly the arrangements that are now in effect at United Nations Depot with reference to the loading and unloading of cars to pier floors and vice-versa?

A. That will have to be divided into two categories?

One, the freight which is handled by the in-transit depot, and

Two, the freight that is handled by the Port of Embarkation.

The War Department has leased from the Norfolk Western Railroad that facility for a substantial sum. The War Department also has entered into an operating contract with the Lincoln Terminal Tarding Company—Lincoln Tidewater Terminal Company, under which contract the Lincoln Tidewater Terminal Company assumes the obliga-

tion of unloading the cars at shipside and, under a separate contract or agreement with the railroads obtains a fee for that service, a wharfage handling fee of approximately 80 cents a ton. Under the Lincoln Tidewater Terminal's contract with the government all such sums revert to the government, the government paying the out-of-pocket expense, the cost of the labor, and the cost of supervision, plus a service fee to the Lincoln Tidewater Terminal Company.

Q. Are those payments which the carriers have been and are making to the Lincoln Tidewater Terminal Company made by checks of the carriers?

A. Yes, sir.

Q. Do you know how those checks are made payable?

A. They are endorsed over to the government.

Q. They are made payable to the Lincoln Tidewater Terminal Company?

A. Payable to the Lincoln Tidewater Terminal and are endorsed over to the government.

Q. Have you ever had conversations with carriers' representatives as to the manner in which this loading and unloading service is being performed at United Nations Depot?

A. Yes, sir.

Q. Can you state with what representative you have had such conversation?

A. Yes. With the Pennsylvania Railroad and its representatives, with the Norfolk and Western and its representatives, with the Belt Line and its representatives, and with the Virginian.

It is a long, continuing series of conversations which have extended over a two-year period and the formal results of those conversations are summed up in the formal demands which we have made in this file of correspondence which already has been submitted in evidence.

Q. In those conversations, did the carriers' representatives indicate to you that they knew that the proceeds of the payment they were making for the unloading service were going to the government?

A. I mentioned that to them, yes. I can not testify that I told each one that I have listed. I may have told the Pennsylvania of that situation and not told the Norfolk & Western, or vice versa; but the Pennsylvania—yes, I can say the Pennsylvania, the Norfolk & Western, and the Virginian are all thoroughly familiar with that situation, and the C. & O. also.

Q. Have you entered into arrangements with the Chesapeake & Ohio with respect to the performance of unloading and loading at their piers at Hampton Roads?

A. Yes, sir.

Q. Will you describe that briefly?

A. The situation at Newport News, the Newport News terminals of the C. & O. are quite comparable to the Army base situation. When the Port of Embarkation was activated we took over the C. and O. Pier organization,
21 that is, its piers, supervisory force, its pier labor, its pier superintendents, and so forth, and under a contract giving the government the preferential right to use their facilities, the government pays the payroll of that type of labor of the pier organization and performs the same service of car unloading that the C. & O. formerly performed with men on its own payroll, and in consideration of our taking over the complete payroll and their organization, the C. & O. makes an allowance to the government of 50 cents a ton on freight passing over the piers.

Q. There is no wharfage allowance?

A. There is no wharfage allowance because the government pays nothing for the use of the piers. The C. & O. maintains the piers, keeps them in good repair, and so forth, so, therefore, no wharfage is involved.

Q. At Army Base Piers 1 and 2, can you indicate to what extent it has proven necessary to use the soldier labor for unloading because of the inadequacy of civilian labor?

A. That is a varying factor that goes up and down as our load increases. We have only a limited number of car unloaders. We have now assigned permanently to that work certain Italian service unit numbers, formerly prisoners of war. They unload cars for us, and from time to time we use troops, and, to meet emergencies, we even have had to use troops that were being staged; that is, troops on their way overseas.

Q. If the carriers were performing that service, would you permit them to use civilian labor exclusively to do so?

22 A. Yes, sir, to the extent it was available.

Mr. MacGuineas. That is all of the direct examination.

Cross Examination.

Q. (By Mr. Cousins). General Kilpatrick, I do not quite understand your last answer.

What did you mean when you said you would permit the carriers to use civilian labor to the extent available?

A. Just what I said. There is not in this vicinity sufficient civilian labor, in my judgment, to do that job. It must be supplemented by Army labor, I mean to meet the peaks and the emergencies with which we are faced. We have a convoy deadline to meet and we have to work day and night. After you have worked all the available civilian labor all day, they can not work all night, and a new crew has to be brought in.

Under certain circumstances it has been necessary to use soldiers to help at the Lincoln Tidewater Terminal at Sewalls Point in the in-transit depot car unloading.

When the flood of cars was too heavy for the available amount of labor that they have, soldiers have been used to unload cars for the Air Corps in the in-transit depot, which is strictly a function of the Lincoln Tidewater Terminal Company.

In other words, the urgency of the movement is paramount regardless of who does the work, whether it is soldiers or civilians or what. We have to keep our
23 freight moving. We have to load our ships and we have to meet our convoy dates.

Q. When you are doing that work, you work 24 hours a day?

A. Yes, sir, at times.

Q. Most of your freight, I suppose, is export?

A. Almost exclusively export.

Q. If the railroads were going to undertake to perform the service for you they will have to load just as you do; that is, continually 24 hours a day?

A. At times, not always. As these emergencies come, the emergencies have to be met and we can not always foresee them. It depends upon the calls from overseas.

Q. How much notice would you give the railroads? How much notice would you be able to give a railroad that you wanted them to unload certain freight from a car?

A. The amount of freight that is set up for each convoy is known weeks in advance. We set up the total tonnage for a convoy and the total tonnage which is allocated to a specific terminal we know well in advance.

The specific answer to your question is more in the railroad's hands than in ours because how the peaks run depend upon the delivery of freight by the railroads. We can give the total tonnage but we can not always tell exactly when the railroads are going to deliver the freight to us.

Q. You know what you want to put on the boats but you do not know when it is going to arrive at the base?

24 A. Exactly.

Q. Is it a fact that some of the freight coming in for a convoy must be unloaded from the cars immediately?

A. Yes, sir.

Q. And that other freight for the same convoy will stand in your piers some time?

A. That is possible. With the big flow of freight coming in and with the uncertainty as to specific delivery dates, we have a difficulty which commercial interests don't have. We have to load bottom cargo first, then filler cargo, then on top of that blow-up cargo.

As freight comes into the piers, we are sometimes in need of bottom cargo and have to hustle those cars in right down to the piers and work them, whereas other cargo for that same ship or for the same cargo which is loaded later in the loading cycle may be in the port for several days.

Q. Do you think it will be practicable for the various railroads to undertake to handle their own freight separately; that is to say, for the Norfolk-Western to come in on the pier and unload its freight, then the Pennsylvania to come in and unload its freight, and for all the others to do likewise?

A. That would present a very complicated situation. That does not obtain in other ports where the railroads are now fulfilling that function. In Baltimore the railroads actually unload.

25 Q. Your situation requires more unified operation than that, does it not?

A. No, I would not say so, if it were properly organized. We could not have these hiatuses, we could not have delays while the Pennsylvania were unloading, and a gang of labor to unload a Pennsylvania car, and then a Norfolk-Western car come in and they say, "We will not touch that car. You will have to telephone and get a Norfolk and Western gang." That would be an almost impossible operating condition.

Q. You have to have the whole operation under one supervision and control, do you not?

A. That is desirable.

Q. In your opinion, why did the Army think it necessary to take over this pier instead of making use of the pier under the prior public operator?

A. That would not have been feasible at all, because the Army has to control the overall operation, the bringing of the cars in, the allocation of ships, and so forth. It has to

be an Army operation. It can not work under civilian direction, I do not think.

Q. That would not be from the standpoint of controlling the ships, would it, so much as controlling the situation on the piers?

A. Everything, ships, cargo, and everything. Bear in mind we have embarkations and debarkations. We
26 handle prisoners of war over these same piers at the same time. We even have to move a ship out into the stream that is loading cargo in order to load troops or to take off prisoners of war or rotational troops.

Q. I understand you have to control the movement of the ships. Of course you would do that no matter who was operating the pier in so far as those ships were in government service, but what is the difference between the operation of the piers now from what they were prior to 1942?

A. The government controls the priorities of loading and the type of loading, it controls the stevedores in how they work and when they work, when they work overtime, and when they work straight time. The car unloading has to fit in with the over-all picture.

A civilian organization could not handle the freight from the depot into the ship. That is supervision that the Army has to furnish and a coordination that the Army has to furnish.

Q. I understand that there is a rather large storage yard—that is, railroad tracks in back of these piers. Is that so?

A. Well, yes, although that is a comparative question. It is not large compared to the big classification yards of the Virginian or the Norfolk and Western.

The capacity, I think, is in hundreds of cars, not thousands of cars.

Q. You do have the yard which is capable of hold-
27 ing several hundred cars?

A. Yes; the exact number I have forgotten. I think it is around 500. That is, operating capacity.

Q. How many railroads reach that yard?

A. The Belt Line.

Q. And the Virginian?

A. It does.

Q. Can you tell us generally where they come under your property?

A. That is a technical railroad operating question that I am not quite competent to answer. I think we will have other witnesses who are completely familiar with the tech-

nique of the railroad operation who can answer that question better than I can.

Q. You will have some one who can tell me how the railroads make delivery into this yard?

A. We have officers who are quite competent to testify on that point.

Mr. COUSINS. Are they going to testify?

Mr. MACGUINEAS. I think that is a question that should be addressed to counsel, not the witness.

Mr. COUSINS. All right. Will you answer?

Mr. MACGUINEAS. I think my redirect examination will clarify the situation.

Mr. COUSINS. If you are going to clear it up through the General, I might as well do it right now.

28 I want to know a little bit about the operation in the yard.

Mr. MACGUINEAS. You may ask him anything you like. He said he could not answer that question.

Exam. DISQUE. In that connection, do the railroads bring the cars to you at will or do you order them to bring—

The WITNESS. We order them to bring them in.

Q. (By Mr. COUSINS). Do you want to say how far from shipside the entrance to the yard is, or would you prefer to leave that to someone else?

A. I would rather leave that to someone else.

Q. How long do you hold that freight on the pier before it is exported?

A. There is no way to average that. At times the freight comes right out of the car and into the ship without ever touching the pier except to be carried across it in motion.

In certain other cases, when we can bring freight in and stock our piers, unload the cars and marshal our freight for a ship, it might stay on the piers for a period of two, three, four, five, or six days. There is no way of averaging it up. We keep no statistics on that.

Certain categories of freight are kept on the pier under priorities.

After we have brought freight in to load on a ship, overseas will tell us they do not want flour or they do not

29 want oil or gasoline, but want something else put in the space in the ship that we had intended to put this particular type of freight in; then it might remain on the pier for some days until another convoy or until we had space to get rid of it, or ship it back to the depot; and also certain small quantities of freight might stay on the pier some days when they are shut out.

For example, we may calculate 100 cars of flour will go into a ship. As the loading progresses, we find that 5 cars are shut out. They stay on the pier until they are reallocated to another ship and that period might be days or it might be a period of a couple of weeks.

Q. Is the freight that is kept in storage for more or less time generally kept in the sheds after unloading rather than in the cars?

A. Yes. We release the car at once. Our objective is to reduce to the irreducible minimum the length of time that cars are immobilized; so we discharge them and release the empty cars just as soon as we can.

Q. That would mean when you do not have a convoy on hand that you would be unloading all of that incoming freight on the pier?

A. We always have a convoy on hand. We are always working. This is a continuing situation.

Q. I suppose it should be the other witness I should ask about the use made of your locomotives on the property. Is that so?

A. Well, I can answer that. The Belt Line keeps one locomotive at the Army base at all times. We have several Army locomotives. We found great difficulty in determining what was the obligation of the railroad as regards placement. It required too complicated statistics to determine whether a car had been placed once or whether this was the second time we called for the car to be placed.

We made a deal with the Belt Line that they keep one engine and one crew there all the time. They worked for us without regard to whether a specific car might have been placed by that locomotive once or twice or three times, and the Army has its own train crews.

There is the one Belt Line locomotive and the Army locomotives. Our total switching requirements are adequately taken care of.

Q. How many Army locomotives do you have?

A. I think we have three. I may be inaccurate on that. I would like to check later on the accuracy of that statement. I think it is three.

Q. Is any freight brought into the piers and taken out again other than by vessel?

A. Negligible amounts. At times we have to transfer freight from one pier to another and two or three cars might be shut out of a ship for a certain specific destination and the next ship going to that destina-

tion might be instead of at the Army Base berthed at Newport News, in which case we would transfer the freight either by car, by truck or by lighter.

Q. But it would be within the limits of this port, would it not?

A. Within the limits of this port, with the exception of certain isolated cases where we might ship freight back to a depot, an overshipment, for example. As a specific illustration—I guess I better not go into that and be too specific.

Q. That is all right. That is enough.

Is all of the freight that comes on to your pier in condition for export?

A. Yes, with very minor cases. Certain boxes may have to be recoopered. We do recoopering on the pier. In certain cases if it is badly damaged, we may have to send them back to a depot.

Q. But you do not do any assembling?

A. On the piers, no.

Q. No manufacturing of any kind?

A. No, not on the piers.

Exam. DISQUE. What do you mean by assembling?

The WITNESS. We do a certain amount of processing of vehicles. They come to the Army Base and they would not be unloaded on the piers. They would be unloaded
32 in the parking space where they can be prepared for export, then they would be towed down to the piers to be loaded on to the ship; but the actual processing does not take place on the pier.

Have I made myself clear?

Exam. DISQUE. Mr. Cousins used the word "assembling."

Mr. COUSINS. Yes, that is what I had in mind.

Mr. MACGUINEAS. I think counsel ought to define his word. He used it.

Mr. COUSINS. The witness and counsel understand each other. I think everybody else does.

Q. (By Mr. COUSINS). How would you expect the railroads to perform the unloading with respect to that material that you have just told us is assembled there?

A. That could be done quite easily in the other sections of the Army Base, not on the piers. That is no problem. That is a very easy type of railroad operation.

Q. You would expect the railroads to just unload the car when it came in, a car full of lights, or engines, or whatever it was, back in your warehouse—

A. No, not in the warehouse: on an apron.

Q. Back on the apron; then their obligation would be done, would it?

A. Yes, sir.

Q. You would take the vehicles after they were assembled out to the ship?

33 A. Yes, sir.

Exam. DISQUE. You would be in the manufacturing business on the pier, then, would you not?

The WITNESS. Not on the pier. It is not exactly manufacturing. It is processing. It is water-proofing the vehicle that we do.

Exam. DISQUE. All right.

Q. (By Mr. COUSINS). You said that you permitted a small amount of commercial freight to be handled over the piers.

A. I did not say that. I said a substantial amount.

Q. All right. How do you permit that? What arrangements do you make for that?

A. Either the War Shipping or Ships agent calls us to ask if they can have a berth for handling commercial freight, and if we have a berth available and if it will fit into our schedule, all right. Then there is another type of shipment of billets and steel, which is arranged, as I recall it, through the British Ministry. It is commercial freight, but it is handled through the British Ministry. We have shipped British steel as bottom cargo in lieu of ballast on certain of our Army cargo ships.

Where we shipped cement commercially in one case, the civilian contractor that was involved made the arrangement direct with us for that shipment.

Q. That was export?

A. Export.

34 Q. Who unloaded the car?

A. We did. I do not recall the specific understanding, but I would remember if any outside group had come in to do it. We did the unloading for him.

Q. You made a charge for that?

A. No.

Q. In other words, is that just a courtesy?

A. We expected the railroads to refund it as a result of this action.

Exam. DISQUE. On these commercial shipments, who is the carrier? Is the government the carrier or is it some private ship into which you and the private shipper are loading freight?

The WITNESS. That is a question I would rather let Mr. Deyereaux, the War Shipping man answer. It is a very complicated question as to who charters the ship, just where the Army and just where the War Shipping Administration ends. I would not feel competent to testify as to the detail of those arrangements.

Exam. DISQUE. It may not be important but I would like to know for my own understanding of the case.

Q. (By Mr. COUSINS). I think you said that the only commercial freight coming in, imported; was ore?

A. Ore is the only substantial amount. One other ship with commercial freight came into Newport News, one of the Luckenbach ships, with about 12,000 tons of miscellaneous cargo from East Africa and other points in that vicinity and while they agreed to get the ship in, unload it and out, they did not keep their promise. Our piers were cluttered up with all sorts of commercial freight while they were clearing customs, while the Department of Agriculture was passing on certain things, while certain other types of freight was being classified. Since then I have not permitted import freight of a miscellaneous character, or miscellaneous cargo. Bulk cargo, like ore and so forth, that can go from ship into a car and away, yes, but when a cargo requires classification, sorting, inspection and so forth, on the piers before it is shipped, we have stopped that.

That tied up our piers too long and too much.

Q. The ore is a bulk freight that goes into open top cars?

A. Into open top cars and away.

Q. When you say there has been a substantial amount of commercial freight handled, were you talking about Army Base Piers 1 and 2?

A. Yes.

Q. What is a substantial amount? What do you mean by that?

A. I think I can tell you in carloads. During the period that we are discussing, something over 700 cars of freight were so handled.

Q. Was that largely export freight?

A. Export freight.

The import freight was something over 20,000 tons.

Q. Can you tell me a little more closely what period this export freight moved out in? We are talking about a two-year period.

A. A two-year period.

Q. Has that moved lately?

A. The last commercial movement that I recall was an ore ship coming in, and that was a couple of months ago. I do not remember the exact date.

Q. When did such commercial freight move out export?

A. I can not answer that. I would have to look that up.

Q. It has not been lately, though, has it?

A. I do not know. I would have to check on that.

Q. Was the larger percentage of your commercial freight handled just shortly after the former operator which I think you said was the Transport Trading and Terminal Company—what was the name?

A. The Transport Terminal and Trading Company. I have not the data on the specific dates. I would have to check that, but the handling of this export freight had nothing to do with the former operator. There was no connection between the two. It was not a hold-over from his operation. It was a new transaction.

Q. In connection with this commercial freight, do you permit vessels to come into your pier for loading or
37 unloading of which you are making no use at all?

A. Yes, when it does not interfere with our normal Army operation.

Q. Do you assess dockage charges against such vessels?

A. Yes, and we have collected.

Q. I did not quite understand what you said about the payments to the Lincoln Tidewater Terminal. Did you say for what kind of freight those payments were made?

A. Export freight and import freight.

Q. By that do you mean the government freight or commercial freight?

A. Both. There has been no commercial freight to my knowledge that has gone over the Sewalls Point pier, although there might have been, but I have no knowledge of that.

Mr. MacGuineas. By "Sewalls Point" you mean the United Nations Depot?

The Witness. United Nations Depot, yes, sir.

Q. (By Mr. Cousins). Does the Lincoln Tidewater Terminal Company have the right to handle commercial shipments there?

A. Yes, sir.

Q. On its own account?

A. No, for the account of the government, and all income they get from it goes to the War Department.

Q. You have not known of any payments made by the Pennsylvania Railroad Company to Lincoln Tide-
38-39 water Terminal for handling your freight, have you?

A. No. The Pennsylvania, as I understand it, has refused to make such payments.

Q. What is the situation with respect to other railroads?

A. Other railroads have. I have not the specific data because that is not under my command. That is by agreement or contract between the Air Corps and the Tidewater Terminal.

Q. Do you know which railroads have made payments on government freight and which have taken the same position as the Pennsylvania?

A. My recollection, and this is subject to correction, that the Virginian has made payments.

Q. So far as you know the others have not?

A. I have no knowledge of whether or not others have. I happen to know that one check was received from the Virginian.

Mr. MacGuineas. I may say another witness will go into that in more detail.

Q. (By Mr. Cousins). Just a word about the C & O arrangement that you described over Newport News. The Chesapeake & Ohio is still in charge of its pier there, is it not?

A. No. We are.

Q. Are you in charge of commercial shipments and everything else moving in there?

A. I have the veto on commercial shipments. The Chesapeake & Ohio get my consent before they contract to bring in commercial shipments.

40 When they come in the handling of them is by the Chesapeake & Ohio. We do not bother with them.

Q. Suppose the freight goes into storage on your facility?

A. It does not.

Q. It does not?

A. No. We control the warehouses. We have rented the warehouses back of the piers and I will not permit any freight to come in which will clutter up our piers. The piers have to be kept free and open. The one time that I did let them handle a large amount of commercial freight, the experience was not happy because it tied up one pier for quite a period.

Q. Was the freight stored there?

A. Well, it was stored there in-transit. It was stored there. Some of it was hemp, for example, which had to be classified, inspected, and so forth, and certain other spigs and so forth had to be cleared by different governmental agencies. We could not get it into cars and away and it cluttered up the piers for quite some period of time.

Q. Is your position as to keeping the piers free of all that sort of freight the same at 1 and 2?

A. Yes, sir.

Q. General Kilpatrick, you are the person who has actually conducted the negotiations with the railroads about this question, are you not?

A. No, I would not say so. I started it. I referred
41 it to the Chief of the Transporation Office, and this action is the result of action on the part of the office of the Chief of Transportation.

Q. In your opinion, why should the railroads pay you what you seek in this case?

A. Very simple. Because they have collected in the line-haul rate for this service and have not rendered the service. They gave the credit to the commercial interests that had the piers before we took over. When we took over on the 15th of June, the physical situation was not changed at all. The same men unloaded the freight, the same supervisory force supervised the men who were unloading the freight. The only difference was that Uncle Sam was paying the bill and any profit or loss would be to the government and not to the private terminal operator.

It never occurred to me that we would not get this credit because I figured on that offsetting the cost of our pier organization, as it did at Newport News.

Q. Why should the Pennsylvania Railroad, for example, help pay the cost of maintaining your pier?

A. The Pennsylvania Railroad in its line haul rate has included an amount for export, it has added a certain amount to its freight rate at some time or other in the past. The rate is built up on that.

Q. You have answered both of my questions in ex-
42 actly the same way, which, as I understand it is that the freight rates include the service, the payment that you are asking for, therefore your position is if you do not get it the government is paying too much of a freight rate?

A. No, I did not say that. I said the railroad companies are perfectly willing to give a private interest this credit and on exactly the same facilities they did give the credit

up to the time we took over, the only change in the situation being the direction, the directive force, that is, who handled the operation.

The same people did it, they did the same thing, but as of the 15th of June, because the government took title to the operation, the railroads stopped allowing the credit.

Q. General, you do not care what the railroad did for this private operator so long as you are not paying excessive freight rates, do you?

A. I think that the government should be treated exactly as commercial interests. I do not see why the government should not have the same rights and privileges that a private interest has.

Q. What does it matter to you whether it is so treated or not?

Mr. MacGuineas. Mr. Examiner, I object to this line of questioning. General Kilpatrick is here as a witness to state the facts with which he is familiar. He is the
43 witness here to state the position of the United States of America and not legal conclusions, and in this connection I think recent questions have been along that line.

Exam. Disque. He started the complaint. He complained about a certain situation. Mr. Cousins is trying to find out what his complaint is.

Mr. MacGuineas. The complainant is the United States of America. The decision with respect to filing the suit, as the General testified, was not made by him; therefore what he may think about the basic issues of the case is immaterial.

Exam. Disque. Who is the Government? Who should testify as to what the complaint is? Who is complaining here? Who is the man who is complaining?

Mr. MacGuineas. No man. It is the United States of America, the sovereign, that is complaining.

The issues here are perfectly well defined in the complaint and they will be defined in the brief.

This witness is just testifying to the facts which we contend will support the issues as we framed them and I think the cross examination should be limited to a cross examination on the facts.

Exam. Disque. The government has no thought on this matter. It is strictly a question of fact and law.

Mr. MacGuineas. I do not see how any lawsuit may involve more than facts and law.

44 Exam. Disque. There must be some reason why a lawsuit is started.

Mr. Cousins wanted to know why it was started.

Mr. MacGuineas. Mr. Cousins ought to read the complaint. Our reasons are set forth in the complaint.

Mr. Cousins. I am not asking the General to draw any legal conclusions, Mr. Examiner. I will not ask him any question that requires a lawyer's answer.

Exam. Disque. Have you all the information you want?

Mr. Cousins. Almost.

I would like to proceed a little bit.

Q. (By Mr. Cousins). General, if the railroads should discontinue the practice of absorbing these wharfage and handling charges at Norfolk, would that be satisfactory to you?

Mr. MacGuineas. Mr. Examiner, I object to that question.

Exam. Disque. Will you answer the question?

Mr. MacGuineas. No. I am not authorized, and neither is General Kilpatrick authorized to answer that question.

Exam. Disque. Somebody brought this complaint.

Now, who was it?

Mr. MacGuineas. The United States of America brought the complaint.

Exam. Disque. Will the United States of America be satisfied if the railroads withdraw this allowance at the piers?

Is that your question?

45 Mr. Cousins. Yes, but I am not concerned about the United States. That is me just as much as anybody else.

I want to know how General Kilpatrick feels about it. I will be satisfied if he speaks for himself. I can speak for myself.

The Witness. I will not answer that question.

Q. (By Mr. Cousins). Why will you not answer it?

A. Because that would get into—I do not think I have to explain why. My personal feelings have no bearing.

Mr. Cousins. Well, I think I will drop this line of questioning with the understanding that there is not the issue of undue prejudice in this case because counsel for the Government certainly has objected to any questions that might tend in that direction.

Exam. Disque. Is there an allegation of Section 3?

Mr. MacGuineas. There is no understanding at all as to what the issues are in this case. The complaint states what the issues are in the case. If we prove them by our witnesses, very well; if we do not, very well.

Mr. Cousins. That is all I have.

Q. (By Mr. Reynolds). Am I correct in understanding that the Army now owns Army Base Piers 1 and 2?

A. The government owns them. There has been a series of transactions between the War Department, the Maritime Commission, the Navy, different government
46 agencies, but the title rests in the United States Government or one of its subsidiary branches.

Q. I have been under the impression that the Army constructed the Army base at Piers 1 and 2 during the last war; is that correct?

A. That is correct.

Q. Between the last war and this war they leased them out to various people, and on June 15, 1942, they assumed possession again?

A. That is correct. That is, the Army did. The Maritime Commission had leased the piers to these commercial interests.

Q. But the Army constructed the piers, as I understand it, during the last war?

A. Or immediately thereafter.

Q. Or immediately thereafter. They were used for war purposes during the last war, were they not?

A. I do not know. They were not finished in time to be used for anything except the reverse movement. The extent to which they were used I am not familiar with.

Q. They were constructed for the purpose of being used just as they are used today, were they not?

A. Yes, sir.

Q. I understood you to say that there is a Belt Line engine in the Army base that is engaged in switching cars in that base; is that correct?

A. Yes, sir.

47 Q. Is that engine not operated under the control of the government yard master in the base?

A. I am not competent to answer that. I would rather have one of our technical witnesses cover the detailed operation of the yard.

Q. You do have a government yard master in the Army base, do you not?

A. Yes. I think he actually is on the payroll of the Navy, though, not the Army.

Q. Is it not true that he controls the movement of all cars within the Army base?

A. I would rather have another witness answer the technical details of that operation.

Mr. REYNOLDS. That is all.

Q. (By Mr. DIXON). If the carriers took over the work on Piers 1 and 2, where would lie the ultimate responsibility for getting it done? Would that responsibility finally be yours?

Mr. MACGUINEAS. Now, Mr. Examiner, I submit that is a question of law when he asks "what is the ultimate responsibility?"

Exam. DISQUE. As the question is framed, you are asking a question of law. You were asking him what he would expect.

Mr. DIXON. Yes.

Let me put it this way: Would the railroads personnel be subject to your orders?

48 The WITNESS. Within certain lines, yes, similar to the way the situation operates at Baltimore under exactly comparable conditions. There the railroad personnel does the car unloading for the Army.

Q. (By Mr. DIXON). I am not familiar with the situation at Baltimore.

Could you describe just what you have in mind?

A. I think I have answered it.

Q. I am not familiar with the situation at Baltimore. I am trying to simply find out the extent to which you would consider the railroad personnel to be under your supervision and command.

A. Not under my command. I would tell them what we wanted to accomplish, what cars we wanted unloaded, when and where, and I would expect them to do it.

Q. Precisely as designated?

A. Yes, sir.

Mr. DIXON. That is all.

Q. (By Mr. WINN). Would it be a satisfactory operation if the railroad personnel should unload these cars at their convenience and in the way they, from an operating standpoint, wanted to do it?

A. No. They would have to unload them in such a way as we could keep our ships moving.

Q. In other words, the unloading work would have
49 to be done according to your schedule to meet your need?

A. Yes, sir.

Q. And it could not be done at railroad convenience?

A. No.

Q. Have you not also made it clear, General, that the available civilian personnel is inadequate to do this job?

Have you made that clear?

A. In my judgment the available civilian supply of car unloaders in the port is inadequate.

Q. So that this job of loading and unloading and handling freight between car and ship could not really be done by the railroads with the civilian employees?

A. They have done it at Baltimore under similar conditions. They might have to import labor.

Q. They might have to import labor?

A. Yes, sir. They might have to take other steps to provide an adequate supply of labor.

Q. You have used Army personnel to supplement the civilian workers?

A. Yes, sir.

Q. During peak times?

A. Yes, sir.

Q. Now, you say this operation is continuous, you are unloading cars all the time, and you are loading vessels all the time.

Currently, what proportion of your employees are doing unloading work that are Army personnel, either Italian or American, and what proportion are civilian?

A. I would have to look up our statistics before I answered that question. My impression is that at the present time we have about half enough civilian car unloaders. I may be wrong in that. It may be a smaller percentage or it may be greater.

When I say it is a continuing operation, that does not mean 7 days in a week. On any one given date we might have nothing going on, then we would swing into another convoy.

Q. You are now in a 50-50 basis as between civilian employees and Army personnel?

A. In general, I think so. I may be a little bit off on that. The availability of civilian car unloaders at present may be slightly under that.

Q. Under 50 per cent?

A. But the factor that makes it difficult for us to get labor is the price that we pay. If we raised the pay we could get more men.

Q. Of course, the railroads would be freer, I suppose, to pay an unlimited wage scale, more so than the Army.

You spoke of Army personnel coming in at peak periods. I was wondering whether or not the peak periods are not almost the normal periods?

A. Not quite, but they come rather frequently.

Q. So that the ~~peak~~ period that you speak of would
51 be something that would be happening frequently; is that true?

A. Yes, that would happen frequently.

Mr. WINN. That is all.

Q. (By Exam. DISQUE). At these other Norfolk piers where the allowance is made, does the terminal or the unloading agency unload according to the needs of the ships or according to the railroads desires, or do you know how it is handled?

A. It is a confused situation. The terminal company unloads for the United Nations Depot; the Army freight that we handle over the piers for export the Army handles with soldier labor chiefly.

Q. Do you know how it is handled at these other Norfolk piers where the allowance is made? Is not an allowance made out here at Lambert Point?

A. Yes, sir. The car unloading at Lambert Point is done by civilians and in certain cases by military personnel or naval personnel. I am not competent to testify as to the details of that.

Exam. DISQUE. All right.

Are there any other questions?

Mr. MACGUINEAS. I have a few on redirect examination.

Exam. DISQUE. All right.

That is all on cross.

Re-direct Examination.

Q. (By Mr. MACGUINEAS). Will you for the mo-
52 ment confine your attention merely to the process of unloading the cars from pier track to the floor and disregard the balance of the movement from the pier floor into the ship.

Do you see any reason why, if the carriers organized and coordinated an efficient set up, they can not today perform at the Army Base Piers the function of unloading from car to pier floor?

A. They could.

Q. If they wished to import labor, or to provide civilian labor for that purpose, are you content to have them do so?

A. Yes.

Q. Is it correct, General, to say that substantially all of the freight which is unloaded on Army Base Piers from the cars goes into ships without further being shifted around?

A. Yes, the vast majority, subject, as I testified, to a slight interchange between piers.

Q. But that is—

A. That is minor.

Q. Counsel for the Pennsylvania Railroad asked you certain questions about the handling of wheeled equipment, vehicles, and so forth.

Is it correct to say that the vehicles which are loaded on the ship arrive at the pier already assembled?

A. Yes.

Q. In the sense the wheels are on and the axles?

55 A. Yes, sir.

Q. It is a complete car?

A. Yes, sir.

Q. And the so-called processing about which you spoke merely involves water-proofing those vehicles for safety—

A. To withstand the ocean voyage.

Q. Furthermore, the wheeled traffic, the vehicular traffic, which moves over the base piers arrives in open top cars; is that not so?

A. Not always.

Q. Generally?

A. Generally.

Mr. Cousins. May I suggest to Mr. MacGuineas that he ask the witness questions instead of telling him?

I do not think he stated any of this information that you have now suggested to him.

Mr. MacGuineas. You are free to object to questions if you care to do so.

Mr. Cousins. Oh, no.

Q. (By Mr. MacGuineas). At Army Base Piers 1 and 2, will you or will you not allow commercial import traffic to move over that pier as long as it can be handled with reasonable expedition?

A. I will and have.

Q. Do you recall the date of the commercial move-

64 ment to which you testified, which consisted of Red Cross clothing? Can you give us the approximate date of that?

A. It was in November, 1943.

Q. To clarify your testimony about the importation in the Luckenbach ship which you said involved spices and different materials which had to be classified, where did that ship dock?

A. No. 4, Newport News, North Side.

Q. Do you know what railroad is presently doing the car unloading at Baltimore?

A. The B & O, Pennsylvania, and Canton.

Q. And, General, when you were discussing the relative force of civilian and Army labor that has been used recently, were you referring to the port of embarkation as a whole, or were you specifically referring to Army Base Piers 1 and 2?

A. Army Base Piers 1 and 2.

Mr. MacGuineas. That is all.

Re-cross Examination.

Q. (By Mr. Cousins). General, what piers in Baltimore were you talking about?

A. Pennsylvania Pier No. 1.

Q. Pennsylvania Railroad Pier No. 1?

A. Pennsylvania Pier No. 1, the Canton Railroad piers, and the B & O piers.

Mr. Cousins. That is all.

Q. (By Mr. Wixx). When you spoke on re-direct
55 examination to the effect that the railroads unloaded the cars and placed the freight on the pier floor, did you mean placed the freight on the pier floor next to the car, or were you speaking of the full operation, unloading the car and moving it to shipside?

A. Putting it on the floor of the pier.

Q. Convenient to the car from which it is taken?

A. We instruct them to stop the cars at certain places. A cut of cars would be placed adjacent to the ship that those cars were allocated to.

Q. Adjacent to the ship?

A. No, of the pier, on the section of the pier adjacent to the ship. If the ship were on the offshore berth, the south-side; why the cars would be unloaded on the offshore end of the pier on the south side.

Q. What work is there to be done in moving the freight from the point at which you had it placed by the railroads on the pier floor and the tackle point, the ship's line point?

A. If our plan is good we unload the cars reasonably near the hatch that the cargo is going into. We are not always successful in that. If we do not do that, you have a cross current of traffic, and we try, in our allocations, to determine before we order the cars in, before they are unloaded, we try to determine what hatch the freight is going into.

Q. I just could not quite understand your saying

56 that the railroads could do this work of unloading when you have explained to us that in order to do it you used half soldier personnel.

A. It is possible to get additional personnel.

Q. Civilian personnel?

A. Civilian personnel.

Q. But you have not been able to get it?

A. I have not been able to.

Q. Have you sought to?

A. Yes, sir.

Mr. WINN. That is all.

(Witness excused.)

Mr. WAGNER. Mr. Examiner, I desire to offer a petition of intervention on behalf of the Richmond Chamber of Commerce, the State Port Authority of Virginia, and the Norfolk Port Traffic Commission.

Exam. DISQUE. If there is no objection it will be filed.

Mr. REYNOLDS. Would Mr. Wagner mind stating his position?

Mr. WAGNER. I would not, but the petition states it.

Exam. DISQUE. Your position is similar to that of the other interveners?

Mr. WAGNER. I do not know because, unfortunately, I was not here when they intervened.

Exam. DISQUE. It does not broaden the issues, does it?

Mr. WAGNER. It does not.

57 Exam. DISQUE. That is all I care to know now. Proceed.

Mr. MACGUINEAS. Mr. Examiner, I offer in evidence Complainant's Exhibits No. 1 and No. 2, heretofore marked for identification.

Exam. DISQUE. They will be received in evidence.

(Complainant's Exhibits 1 and 2, Witness Kilpatrick, received in evidence.)

HAYS M. HEIMBAUGH was sworn and testified as follows:

Direct Examination.

Q. (By Mr. MACGUINEAS). Major Heimbaugh, please state your name and official position.

A. My name is Hays M. Heimbaugh. I am a Major in the Transportation Corps, Army of the United States, assigned to the Office of Chief of Transportation, Traffic Control Division, Freight Branch, Rate Adjustment Section.

My duties involve negotiating with the carriers for changes in rates, rules, regulations, and practices, either by voluntary adjustment or by proceedings before the Interstate Commerce Commission or regulatory bodies.

Q. When did you join the Army, Major Heimbaugh?

A. I was commissioned initially on June 10, 1928. I have held a reserve commission since that time.

Q. When did you assume active service in the present war?

A. I came on active duty in this war on the 25 September 1942.

58 Q. Prior to that time, what was your occupation?

A. I was with the Rock Island Railroad for fourteen years in the freight-traffic department, the last seven years of which I represented the Rock Island on various committees in which the Rock Island was interested, including Western Trunk Line Territory and on Western Trunk Line I was the Rock Island alternate representative.

Q. To what extent did your work on the Rock Island deal with freight tariffs?

A. I dealt with that entirely.

Q. Major Heimbaugh, have you prepared an exhibit which shows the line haul tariff now in effect covering export, import, coastwise and intercoastal traffic moving through Norfolk, Virginia?

A. I have. It is the exhibit that has the letter "A" up in the left hand corner.

Q. In red pencil?

A. In red pencil, I believe.

Mr. MacGuineas. May we have this identified as No. 3?

(Complainant's Exhibit 3, Witness Heimbaugh, marked for identification.)

Q. (By Mr. MacGuineas). Major Heimbaugh, will you point out for the record the particular portions of your exhibit which are especially applicable to the claim-

59 ant's contentions here and discuss them?

A. In general, this exhibit contains the provisions in the tariffs from the major rate territories, from each of the major rate territories, from or to which export and import rates are published through Norfolk.

The exhibit does not purport to refer to every tariff that publishes rates of that kind, but to the extent that the tariff does contain excerpts concerning the application of those rates the representations for the tariffs referred to are a full representation.

From some territories, such as transcontinental territory, for instance, for which export rates are not published into Norfolk, we have not included in here any items relating to the application of the transcontinental rates eastbound.

I think you will understand as we proceed through the exhibit what the general plan of the exhibit is.

The first tariff referred to is trunk line tariff 80-C, Curlett's I. C. C. No. A-694. Referring to Item 100-C beginning on page 4, that states the application of import rates. In other words, it sets forts the conditions that will prevail in order to obtain the application of import rates as named in that tariff.

It states: "Import rates named herein will apply on property delivered to the rail carrier direct from shipside or dock of vessel."

60 Q. What page is that?

A. It starts at the bottom of page 4 and I finished reading at the top of page 5.

Exam. DISQUE. There are two numbers on each page.

Mr. MACGUINEAS. May I state for the record, in all cases the printed number is to be ignored.

The WITNESS. Pay no attention to the number in the lower corner. That has nothing to do with the numbering of the pages. That, in brief, is the way our import and export traffic is handled. It is handled direct in bringing the property to Norfolk.

Q. (By Mr. MACGUINEAS). Is there any reference in this tariff to traffic handled over Army Bases?

A. There is. On page 6 of the exhibit you will find Item 110-C reproduced and in the next to the last paragraph of that item you will find this:

"Export rates will also apply on shipments consigned on bills of lading for export, destined to foreign countries or foreign possessions of the United States, handled through United States Navy Yards, Naval Bases, or Army Bases, or delivered to United States Government vessels docked thereat on presentation of proper evidence of exportation."

Our export shipments through Army Base Piers 1 and 2 went through these Army facilities and regardless of whether they moved through Army facilities or not are

61 indicated as being for export on the bill of lading and there is evidence of exportation given the carrier as set forth in the paragraph I just read.

Army Base Piers 1 and 2 are a part of the Army Base here at Hampton Roads Port of Embarkation.

Now, we move over to page 9 of the exhibit and the last paragraph on that page contains the item practically the same as the one I have read. This item appears in Jones' Tariff I. C. C. No. 3642. That tariff contains export rates from Central Freight Association territory.

Exam. DISQUE. Since they are charging export rates, what is the purpose of showing this?

The WITNESS. This conforms to the allegations made in the complaint respecting the existence of export rates.

Let me take you back to page 3 of the exhibit. In the first paragraph there is shown Item 30-A. This relates to Curlett's Tariff No. 80 which provides for export rates from origins in trunk line territory and it states:

"The class rates published herein for application on import, export, intercoastal and coastwise traffic take precedence over other class rates between the same points via the same routes. From and to points shown on pages 7 to 32, inclusive, of tariff, as amended from and to which no import, export, intercoastal and coastwise rates are specifically published herein, the class rates published on
62 domestic traffic in other tariffs lawfully on file with the Interstate Commerce Commission from and to such points will apply on import, export, intercoastal and coastwise traffic and will be subject to rules and application of rates as published herein governing import, export, intercoastal and coastwise traffic."

So if it is found necessary from an origin in trunk line territory to supply the domestic class rate to Norfolk, they do apply on shipments exported through Army bases.

Turn, please, to page 16. That contains again the provisions relating to export shipments through Army bases published in C. F. A. Tariff 218, I. C. C. No. 3758, which is a tariff that contains the commodity rates.

On page 18 we have a similar application in trunk line tariff 107-C series Curlett's Tariff, current I. C. C. Nos. 107-B—that should be I. C. C. No. A-593 and A-767, which applies from and to stations in western trunk line territory.

It will be noted as you go through the exhibit that the provisions that are in effect now are the provisions that were in effect at the time the Army took over the operation at the Army Base. In other words, no change has been made in these tariffs in so far as the line haul charges are concerned to compensate for the work that is being done by the Army and for which no allowance is currently being made.

Q. (By Mr. MACGUINEAS). Major Heimbaugh, does Curlett's Tariff No. 107 contain any specific provision
63 with reference to traffic handled over Army Bases?

A. It does. That is the bottom paragraph, the paragraph shown at the bottom of page 18.

On page 23, we have the application shown in Western Trunk Line Territory, L. E. Kipp's Tariff I. C. C. No. A-3472, which names rates from origins in western trunk line territory to Norfolk and other North Atlantic ports.

Here is an item which says:

"Under the application of shipside rates, rail lines will make no allowance or payment for transferring freight directly between ships and open top cars by ship's tackle, ship's stevedore, or ship's contract labor, alone or in conjunction with mechanical or other facilities."

That is a clear implication as to box car traffic that the shipside application does include the performance by the carriers themselves of this unloading to the pier floor or for an allowance therefor.

The application in this tariff also indicates that the same provisions are applicable at other North Atlantic ports, including Baltimore, to which the General referred, where the carriers are unloading the car.

Turn to page 29, please. We have on page 29 the beginning of the provisions found in Southern Freight Association Freight Tariff 712-C, Hoke's I. C. C. No. 712, Item 130 and dropping down to the large paragraph, it says:

64 "If the charges accruing under the rail-water or all-rail rates applicable via Norfolk," and the other ports named therein, "to Baltimore, Maryland, as published in tariffs listed in Item 135 are lower than the charges accruing under the rates to Norfolk * * * published in this tariff, as amended, plus wharfage and handling charges applicable at said Virginia Ports as published in R. H. Hoke Tariff 326-F, the lower charges resulting from such rates to Baltimore, Maryland, will apply to shipside at Norfolk."

Exam. DISQUE. What page are you reading from?

The WITNESS. Page 29.

This application is different from the ones we referred to heretofore. This tariff applies from certain stations in Southern Freight Association territory and has shipside application when certain conditions prevail.

While you keep that place at page 29, turn, please to page 43. Down at the bottom of page 43 and at the top of page 44 are some rates, both all-rail and all-water, as found in Agent Hoke's I. C. C. No. 712 from Army Depot, Georgia, to Norfolk, Virginia, and on page 44, the rates from Army Depot, Georgia, to Baltimore, Maryland, both all-rail and

rail-water to Baltimore. You will notice that the all-rail class rates in effect now and in effect on June 14, 1942, from Army Depot, Georgia, to Norfolk, Virginia, are the same as the rail-water rates from Army Depot, Georgia, to Baltimore, Maryland, and these rail-water rates still apply to Norfolk, namely, rail line to Norfolk and water line beyond. They are published in Agent Hoke's I. C. C. 8, which is one of the tariffs.

Refer to Item 35, page 29. In other words, as to shipments which would move on class rates from Army Depot, Georgia, to Norfolk, the rate being published in Hoke's I. C. C. 712, such a rate would be actually shipside rate, calling for shipside delivery at the Army Base, for instance, in Norfolk.

Q. (By Mr. MacGuineas). May I interrupt?

Will you explain on the record the significance of your symbols "EP" and "E-42"?

A. They are described at the bottom of page 41. EP means export rate in effect at present. E-42 means export rate in effect on 14 June 1942.

DP means domestic rate in effect at present.

D-42 means domestic rate in effect 14 June 1942.

AR is all rail, and RW is rail water.

I may say that throughout these exhibits we have not included the *Ex Parte* 148 increases. This application found in Item 130 of Hoke's 712 appears in the SFA Class Rate Tariff generally applying to Norfolk.

Turn to page 33, please. Next to the last paragraph, page 33, the one numbered 4, contains provisions found in S. F. Tariff 705-F, Hoke's Tariff I. C. C. No. 903, which is a commodity tariff applying from Southern Freight Association Territory and publishes export rates.

That paragraph, you will notice, is the paragraph providing for the export application on shipments moving through Army bases.

Turn to page 35, the very first sentence at the top of the page. We are still in the same tariff, Hoke's I. C. C. 903. "Except as otherwise provided in this tariff, rates published in this tariff do not include wharfage, handling or other charges necessary to affect delivery to shipside."

However, turning over to page 36, you will find reproduced a couple of items which are typical of many in the tariff and right in the item there is provision that it is applicable to shipside. I might say that this shipment of steel articles referred to moved on the rates found in Item 780 reproduced on page 36.

Q. Have you finished your answer on those tariffs, Major Heimbaugh?

A. Yes, sir. That is all.

Q. Do the tariffs to which you have referred contain the omnibus clause making applicable the provisions in terminal tariffs?

A. They do. There is the cross reference to the omnibus clause by item numbers as shown on page 37.

Q. Major Heimbaugh, have you also prepared an exhibit which contains excerpts from the applicable terminal tariff at Norfolk?

A. I have.

67 That is the exhibit with the small "b" in the upper right hand corner.

Mr. MacGuineas. This will be identified as Exhibit No. 4.

(Complainant's Exhibit 4, Witness Heimbaugh, marked for identification.)

By Mr. MacGuineas. Will you also refer briefly to the applicable provisions in those tariffs with reference to export and import traffic charges and allowances?

A. This exhibit contains excerpts from the tariffs of the Norfolk carriers other than the C. & O. Railroad relating to allowances or absorptions for accomplishing shipside delivery or more specific for wharfage and handling and other services at Norfolk.

Turn, please, to page 10. This contains excerpts from Atlantic Coastline Tariff I. C. C. No. B-3068. The item designated as "(a)" states that "in the absence of through rates or specific charges, on coastwise traffic via the Atlantic Coast Line Railroad to Brunswick, Georgia; Charleston, South Carolina; Jacksonville, Florida; Norfolk, Virginia; Pinners Point, Virginia; Richmond, Virginia, and Savannah, Georgia, inland domestic rates will apply to shipside when originating at points in the following States" and so forth.

You will note that refers to coastwise traffic. The Coast Line in its terminal tariff has no corresponding item relating to export traffic or import traffic. The Atlantic

68 Coast Line relies for any shipside application on the specific application in the line haul tariffs, such as Hoke's I. C. C. 903.

Refer to page 12. This contains the provisions found in Norfolk & Western Railway Tariff I. C. C. No. 9179, Railroad Tariff No. 23-E.

In Section 6 of that tariff, Part 1, are found specific provisions relating to the Lincoln Tidewater Terminals, other-

wise known as United Nations Depot No. 9. This same part of the tariff up until 15 September 1942, contained similar specific reference to Transport and Trading Terminal Corporation, which operated the Army Base Piers Nos. 1 and 2.

Q. Until what date?

A. The Transport and Trading Terminal is taken out of this particular tariff effective 15 September, 1942.

Q. Until what date did Transport Trading and Terminal operate Base Piers Nos. 1 and 2?

A. Until 15 September, 1942. In other words, the Transport Trading and Terminal continued in this tariff after the Army commenced the operation.

These provisions say that on traffic originating at or destined to points designated on page 13 of the tariff, subject to Sections 1 and 3 of the tariff—and the description of these Sections 1 and 3 will be found in the first nine pages of this exhibit—when originating at or destined to
69 points designated on page 13 of the tariff the Norfolk & Western Railway will absorb in the line haul rates wharfage charges of one cent per hundred pounds on all freight, also a handling charge of 3 cents per 100 pounds or 60 cents per ton, net or gross, on all freight inclosed cars.

There is there a more specific allowance named with respect to certain classes of traffic. I simply call attention to the fact that they do make absorptions in the line haul rate of one cent per 100 pounds for wharfage on all freight and 3 cents per 100 pounds on freight inclosed cars, in addition to the wharfage, the 3 cents being for handling.

Q. Will you make a brief statement as to the manner in which you have set up pages 3 to 9, showing the territorial application?

A. Take page 12, in the first line, it refers to Sections 1 and 3 of the tariff. Suppose we have some traffic coming from Chicago. You will refer to the first nine pages, running down the left hand column until you come to Illinois. You will then find under the first column opposite "Illinois" a (1). That is the section number shown, the one referring to Norfolk in Western Tariff I.C.C. No. 9179.

In other words, Chicago would be a Section 1 station in so far as this application referred to on page 12 of the exhibit is concerned.

Does that sufficiently explain it?

70 I may say that in general the terminal tariffs fall into three groups. One group is the Atlantic Coast

Line and seaboard which have this very limited application of the terminal tariff dealing with coastwise traffic only.

Then there is the Pennsylvania which has no restriction as to a certain type of traffic. In other words, the Pennsylvania Terminal Tariff applies to export, import, coastwise and intercoastal. It also has no restriction concerning the origin or destination stations.

Then there are tariffs for the other lines, of which the N. & W. is representative, which limit the full absorption of 1 to 3 cents, according to the origin point of the traffic on export shipments and the destination on import shipments, inbound, I should say, and in general that restriction means that to destinations other than Southern Freight Association Territory, from which no absorption as a rule is made in the terminal tariff, the allowance of one and three cents will be made excepting for border points and by "border" I mean stations located on the border between Official and Southern territories, and which are grouped in the N. & W. tariff as Section 2 stations. These are all stations on the C. C. & O. in Kentucky, which are group 2 stations. There is a limited absorption from these border line stations.

Q. You stated that the N. & W. Terminal Tariff until September 1943, made specific references to the
71 Transport Trading and Terminal Corporation.

A. That is correct.

Q. Will you make a statement with respect to the provisions of the other terminal tariffs in that connection?

A. Will it suffice if I refer to them as I come to each of them?

Q. Yes.

A. The Examiner inquired about Lambert Point dock. The absorptions are found on page 13 for that facility.

Turn, please, to page 17. Beginning on page 17 we have provisions published by the Norfolk & Southern Railroad Company in its Tariff I.C.C. A-1148. Specific provisions relating to the Lincoln Tidewater Terminals are found in Rules 170 and 175, shown on page 17. Specific reference to Lambert Point dock is shown on page 18.

Q. What was the facility operated by the Tidewater Terminal known as?

A. That is known as United Nations Depot No. 9. Also in the list of facilities where Lambert Point dock is named, page 18, you will notice at the bottom of the lines, over on the right hand side, there is a C-2 reference, which is explained at the bottom of page 19. It says:

"Transport Trading and Terminal Corporation, formerly shown in this rule is hereby cancelled. No longer in operation."

That change was made by the Norfolk-Southern
72 effective 18 November, 1943.

The publications on pages 17 and 18 are under the general statement made by the Norfolk-Southern that: "when rates from Norfolk, Virginia, on import traffic are published to apply from shipside the Norfolk-Southern Railroad Company will absorb wharfage and handling charges published and lawfully on file with the Interstate Commerce Commission necessary to cover transfer from shipside to cars, on traffic for movement from Norfolk, Virginia, via Norfolk-Southern Railroad Company."

Exam. DISQUE. What page did you read that from?

The WITNESS. Page 17. That is Rule 170.

Q. (By Mr. MACGUINEAS). Proceed.

A. On page 19 we find provisions relating to the matter of allowances made by the Norfolk-Southern. This is applicable at Lincoln Tidewater Terminals, otherwise known as United Nations Depot No. 9. It says:

"For the use of wharves, warehouses, slips, channels, tracks and approaches, and other facilities at the terminals as listed in this rule, and for other services rendered by the terminals listed in this rule; as agent for the Norfolk-Southern Railway Company, the Norfolk-Southern Railway Company will make an allowance equal to the amount of charges as provided in Agent Hoke's Freight Tariff No. 326-G, I.C.C. No. 834."

That is the Southern Freight Association Terminal
73 charges tariff.

Turn, please, to page 20. Beginning on page 20 we have the provisions published by the Pennsylvania Railroad Company in its Tariff No. 2613.

The Pennsylvania Railroad Company currently publishes in its tariff Item No. 305, which relates to the Transport Trading and Terminal Corporation that operated Army Base Piers Nos. 1 and 2 until June 15, 1942.

Item 305 states: "Any charge of the Norfolk and Portsmouth Belt Line Railroad Company for wharfage, storage, loading, unloading, handling, transferring, or any service whatever at the Transport Trading and Terminal Corporation, as per Norfolk and Portsmouth Belt Line Railroad Company Tariff 6-J, I.C.C. 105, will be in addition to the rate to or from Norfolk, Virginia, except that on export, im-

port, coastwise and intercoastal traffic, any quantity, on which the freight rate is not less than 10 cents per 100 pounds, or $2.00 per ton, wharfage charge of 1 cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds or 60 cents per ton, will be included in the freight rate to or from Norfolk, Virginia, with the following exceptions," which are very limited in their application.

The Pennsylvania publishes a similar provision at Lincoln Tidewater Terminals, otherwise known as United Nations Depot No. 9.

On page 21 of the exhibit, we find provisions pub-
74 lished by the Pennsylvania Railroad relating to shipments moving over the Lambert Point dock. As to both Lincoln Tidewater Terminal and Lambert Point dock, the Pennsylvania tariff states that these 1 and 3 cent sums will be included in the freight rate when the Pennsylvania Railroad Company assesses a charge of 10 cents per 100 pounds or more or $2.00 a ton or more.

Mr. COUSINS. Where does it show on page 20 that that last item means United Nations Depot?

The WITNESS. The Pennsylvania tariff does not say "United Nations Depot."

Mr. COUSINS. You just added that yourself?

The WITNESS. That is right, as explanatory, to indicate that the Lincoln Tidewater Terminals as referred to in this item is operating the facilities generally described as United Nations Depot No. 9. We referred to it at one time as Sewalls Point Piers, I believe.

On page 23 of the exhibit is the initial publication made by the predecessor company of the Pennsylvania Railroad respecting the allowances that were made at that time for the operator at Army Base Piers 1 and 2.

You will note the 1 and 3 cent sums were published then and they have continued since that time. The Army supply bases referred to are specifically referred to by name.

On page 24 is where we begin the provisions relating to
the Seaboard Air Line Railroad Company and they
75 are substantially the same as described earlier for the Atlantic Coast Line Railroad and relate only to coastwise traffic.

On page 26 is found the beginning of the provisions published by the Southern Railway System. The last sentence on page 26 just above the table of wharfage and handling charges states:

"Unless otherwise specifically provided in tariffs, the terminal charges shown below must be deducted before pro-rating."

Those charges are shown in some detail.

We can go to page 32 now which continues provisions published by Southern Railway, where is stated the Lincoln Tidewater Terminals, which again is the organization operating the United Nations Depot No. 9, and there are also found provisions for Transport Trading and Terminal Corporation, which formerly operated Army Piers 1 and 2. The 1 cent and 3 cents will be included in the transportation rate on traffic to and from Norfolk. This tariff, like the N. & W. tariff, is subject to this group outlined in detail in the first nine pages of the exhibit as to absorption territory and the non-absorption territory.

The Lambert Point dock absorption provision is found on page 33 of the exhibit.

Page 34 contains provisions in the terminal tariff published by the Virginian Railway Company in its Tariff I.C.C. No. 2196.

76 The Virginian publishes wharfage and handling allowances specifically as to shipments moving over Lincoln Tidewater Terminals and Transport and Trading Terminal Corporation, which are United Nations Depot and Army Base Piers 1 and 2, respectively.

The Virginian tariff also refers to the absorption and non-absorption territories as to origin on export and the destinations on inbound shipments.

On page 37 begins the provisions published by the Norfolk and Portsmouth Belt Line Railroad Company. You have noticed in going through the exhibit that as to Lincoln Tidewater Terminals and Transport Trading and Terminal Corporation, the road haul carriers refer to the charges published by the Norfolk and Portsmouth Belt Line Railroad as setting the amount of the absorption that they make.

We show in this exhibit the charges published by the Norfolk and Portsmouth Belt Line Railroad from the absorption territory. We have not undertaken to reproduce the tariff as to non-absorption territory, because that runs on for quite a number of pages.

In addition to setting forth the wharfage, handling, and other charges for Norfolk and Portsmouth Belt Line Railroad Company at Norfolk, Item 100-B shown on page 37 of the exhibit states:

"For the use of wharves, warehouses, slips, chan-
77 nels, tracks and approaches and other facilities at

the Lincoln Tidewater Terminals, Inc., and/or Transport Trading and Terminal Corporation, Norfolk, Virginia, and for other services rendered by the Lincoln Tidewater Terminals, Inc., and/or Transport Trading and Terminal Corporation, as agent for Norfolk and Portsmouth Belt Line Railroad Company, the Norfolk and Portsmouth Belt Line Railroad makes an allowance, equal in the amount of charges provided in this tariff, or as amended, to the Lincoln Tidewater Terminals, Inc. and/or Transport Trading and Terminal Corporation,"

with the specific exceptions on lumber that prevail generally.

You will notice that the Norfolk and Portsmouth Belt Line continue to refer to Transport and Trading. In fact, in Carrier's Exhibit 2, they show Transport Trading and Terminal in their tariffs:

Q. (By Mr. MacGuineas). And still do at the present time?

A. Right, all but two, I think.

Q. Major Heimbaugh, does your exhibit indicate for how many years these absorption and allowance provisions have been in the various terminal tariffs serving Norfolk?

A. On pages 45 and 46 of the exhibit there is shown the names of the organizations that have operated Army Base Piers 1 and 2 as they have appeared in the tariffs of various Norfolk lines, together with the dates during which the various operators were shown in the tariffs.

78 You will notice that an absorption and allowance provision has been published for the operators back to the early part of 1921. There has been no break.

Q. Major Heimbaugh, have you also prepared an exhibit which shows illustrative shipments of commodities over Army Base Piers 1 and 2 since June 15, 1942?

A. I have. That is the exhibit that has the small "e" in the upper left hand corner.

Mr. MacGuineas. May we have this identified as Complainant's Exhibit No. 5?

(Complainant's Exhibit 5, Witness Heimbaugh, marked for identification.)

Q. (By Mr. MacGuineas). Explain that exhibit, please.

A. This exhibit shows the illustrative shipments, giving the name of commodity, point of origin, actual weight or minimum weight, whichever is greater, the rate that was applied and also the rate if such a movement had taken place since 14 June, 1942, what the freight charges are for

the weight that moved, and it also shows the extent to which those charges would be reduced if the freight had been trans-shipped to vessel for export over Lambert Point docks and over Lincoln Tidewater Terminal, and there is a column for Army Base Piers Nos. 1 and 2. Where the shipments moved in open top cars that is shown under the column "Remarks." That is on the lower right hand side.

You will recall that absorption and allowance provisions provide for one cent on all freight and three cents only on the box car freight or, rather, the closed car freight.

I may say on page 2 of this exhibit, while shipments from origins in Southern Freight Association territory generally are considered together from non-absorption territory, you will note two out of the three shipments, namely, the trailers from Army Depot, Georgia, and the salmon, from Savannah, Georgia, were subject to the absorption allowance provisions and in both cases it happens that the Baltimore maximum application brought into play the shipside provisions of the tariff that named the rate.

The orange juice from Tampa, Florida, moved on a commodity rate which was considerably lower than any class rates and the wharfage and handling, when added thereto, would produce charges well under the Baltimore rate.

Q. Major Heimbaugh, does one of your exhibits contain excerpts from the applicable provisions of the tariff to other North Atlantic ports with reference to absorption and allowance, handling and wharfage?

A. Yes. That is the exhibit that has been designated as No. 4, the one we were talking about prior to the last one.

Q. Will you make an explanation as to those references, please?

A. Beginning on page 17 (Exhibit 4), there is an excerpt from the Pennsylvania Railroad Company tariff applying at Baltimore, Pennsylvania Railroad Company Tariff I.C.C. 2685, in which it states that the freight rate will include loading from lighters or platform of piers under cover to cars or from open piers to box cars, or unloading from cars to platform of piers under cover or to lighters or from box cars to open piers, with the exceptions shown on oil and lumber.

I may say at Baltimore, supplementing the General's testimony, wherein he stated that the carriers unloaded the cars at Baltimore, which is true as to carload traffic, that the Army is unloading l.c.l. freight at Baltimore and the carrier is paying for it.

As to payment from the Canton Railroad, I can refer to check No. 26940, dated April 3, 1944, drawn on the Mercantile Trust Company, Baltimore, which was in payment for labor of unloading cars of merchandise and was a check for $728.54.

Page 49 is excerpt from Pennsylvania tariff applying at Wilmington, Delaware, which states again that the rate will include loading from piers to cars or unloading from cars to piers at Wilmington Marine Terminal, Wilmington, Delaware.

Page 51, Item 395, states that the rate will include loading from piers to cars or unloading from cars to piers on both carriers' piers and other public piers operated by steamship companies, pier companies, city of Philadelphia, Pennsylvania, city of Camden, New Jersey, or individuals, excepting piers controlled by the owners of the traffic.

The Army is moving through Baltimore. There
81 is a terminal operator there, and through him the Army receives $1.17 a ton for the work of unloading the cars.

Q. Do you not mean Philadelphia?

A. Philadelphia, yes, sir.

Mr. COUSINS. Stay right there just a minute.

The WITNESS. All that I read was what I was reading from Item 395 shown on page 51.

Q. (By Mr. MACGUINEAS). Major Heimbaugh, will you please repeat the statement that you made with reference to the allowances at Philadelphia by the carriers.

A. At Philadelphia?

Q. At Philadelphia.

A. The freight is unloaded from the car to pier for export movement in so far as the Army is concerned through the terminal operator, and the Army receives an allowance of $1.17 a ton for this Philadelphia operation.

Mr. COUSINS. From whom?

The WITNESS. From the Pennsylvania, among others.

Mr. COUSINS. I am not trying to cross examine you now, Major Heimbaugh, but it seems to me your answers are not clear.

The WITNESS. I will be glad to clarify them.

Mr. COUSINS. What are you talking about, who is the terminal operator, what pier, who gives you the allowance?

Mr. MACGUINEAS. I think we better reserve questions like that for cross examination.

82 Mr. COUSINS. I am willing to do that but if I have to go back on these details, it is going to take a lot of time to cross examine and all I am after is a little qualification.

The WITNESS. The terminal operator at Philadelphia is the Norfolk Tidewater Terminal.

Mr. COUSINS. What pier? Just make it clear.

I am not trying to contradict you.

The WITNESS. I can not name the pier for you at Philadelphia. I am not familiar with the Philadelphia harbor sufficiently to designate the piers as I would designate Army Base Piers 1 and 2.

Mr. COUSINS. What was the name of that operator?

The WITNESS. Norfolk Tidewater Terminal.

Mr. COUSINS. That is Philadelphia?

The WITNESS. Right.

On page 53 of this exhibit are reproduced two items from the New York harbor tariff, Agent Curlett's I. C. C. A-788.

Item 2525 states: "On import, export, intercoastal or coastwise traffic, rates to or from New York, including free lighterage on articles entitled to free lighterage, will include loading or unloading of lighters, barges, or cars on carfloats in lieu of lighterage at place of receipt or delivery by these companies, except as otherwise provided in this tariff."

The item does not—or rather, the exhibit does not contain Item 4135 and Item 4140 of that tariff; however,

83 Item 4135 states:

"An allowance of 15 cents per ton of 2,000 pounds or 2,240 pounds, as rated, will be made to consignors and consignees within lighterage limits for loading or unloading lighterage free freight, including less than carload freight, and lightered in accordance with rules governing the lightering of such freight to and from carrier's lighters or barges when such service is performed by consignors or consignees."

Exam. DISQUE. What page have you just read from?

The WITNESS. I explained that was not in the exhibit. That is Item 4135 of the New York Harbor Lighterage Tariff. Item 4140 states that allowances will be made on export, import, intercoastal or coastwise traffic.

Q. (By Mr. MACGUINEAS). Before you proceed to the next exhibit, your statement was that at Philadelphia you understood the terminal operator to be whom, at Philadelphia?

A. Norfolk Tidewater Terminal.

Mr. COUSINS. That is what he said before. You said "Norfolk Tidewater Terminal".

The WITNESS. There is not, correct. I should have said Lincoln Tidewater Terminal.

Mr. COUSINS. Are you sure?

The WITNESS. I should have said Lincoln Tidewater Terminal.

Mr. COUSINS. At Philadelphia?

84 The WITNESS. At Philadelphia, that is right, as well as here.

Q. (By Mr. MACGUINEAS). Now, continue.

A. Page 54 relates to the provisions published in Boston by Agent I. N. Doe's Tariff I. C. C. No. 424.

Going to page 56. Rule 60 refers to the absorption made by the Boston and Maine Railroad. Rule 95 refers to the absorption made by the Boston and Albany Railroad and both of those refer to Item 65 of the tariff which provides for an amount of 66 cents per ton.

On page 57 are the provisions relating to the New York, New Haven and Hartford Railroad Company. That also refers to Item 65 which contains the 66 cents per ton.

Q. Major Heimbaugh, do you know whether at the present time at the Port of New York, the Army is receiving allowances for the performance of car unloading service?

A. It is.

Q. Do you know at what rate?

A. 23 cents per ton.

Q. And is the Army actually receiving allowances from the carriers for the performance of unloading services at Boston?

A. It is.

Q. At what rate?

A. The rate varies. The New York, New Haven and Hartford makes an allowance of 66 cents per ton, the Boston and Albany 50 cents, and in addition to that the

85 Boston and Albany, the Boston and Maine, and the New York, New Haven and Hartford allow 80 cents per ton on export freight loaded in open top cars moving under Government bills of lading placed on designated tracks at Boston, East Boston, Massachusetts, for delivery to lighters or barges in lieu of placement on steamship pier when the United States Government unloads the cars to lighters or barges and lighters or barges such traffic, from rail heads to shipside.

Mr. COUSINS. Will you tell what you are reading from?

The WITNESS. This last one is not in the exhibit. I am reading from Section 22 quotation.

Q. (By Mr. MACGUINEAS). Major Heimbaugh, since June 15, 1942, have the carriers been making allowances for the performance of car unloading services at United Nations Depot?

Mr. COUSINS. Objected to on the ground this witness has not qualified himself to answer the question.

Q. (By Mr. MACGUINEAS). Do you know whether or not such allowances have been and are being made at United Nations Depot?

A. I know.

Mr. COUSINS. How do you know?

Q. (By Mr. MACGUINEAS). Will you state what those allowances are?

Mr. COUSINS. How do you know? What have you got to do with it?

The WITNESS. I have examined the Army records.

Mr. COUSINS. Whereabouts?

86 THE WITNESS. In Washington and in Norfolk.

Mr. COUSINS. All right.

Q. (By Mr. MACGUINEAS). Will you answer the question, please?

A. For security reasons I will not give you a full statement. These are payments selected at random for the various carriers for the months indicated, which were payments for the wharfage and handling allowances on traffic moving over United Nations Depot No. 9, designated in the tariffs as Lincoln Tidewater Terminals, Inc.

Mr. COUSINS. Just a minute. By that statement you are referring to what you said to me, that Lincoln Tidewater Terminals is shown in the tariff and you take that to mean the United Nations Depot?

The WITNESS. It is common knowledge that is what it is.

Mr. COUSINS. You said "designated in the tariffs," but there is not anything in the tariffs that so designate it.

Mr. MACGUINEAS. I object to the cross examination.

The WITNESS. It is designated as Lincoln Tidewater. Checks have been so made and I have seen the checks.

Mr. COUSINS. I am pointing out to you that you said that the tariffs designate this thing as United Nations Depot.

The WITNESS. No.

Q. (By Mr. MACGUINEAS). Did you make any such statement as that?

A. I said "United Nations Depot," which is referred to in the tariff as Lincoln Tidewater Terminals.

87 Q. Give us the illustrative list of payments.

A. Payment made by the Norfolk-Western for the month October, 1942, $6,397.29.

Payment made by the Pennsylvania Railroad for June, 1943, was $96.22.

Payment made by the Virginian for April, 1943, was $3,280.39.

Payment made by the Atlantic Coast Line for May, 1943, was $544.68.

Payment made by the Southern for August, 1942, was $3206.82.

Payment made by the Norfolk-Southern for March, 1943, was $627.82.

Mr. COUSINS. All payments being to Lincoln Tidewater Terminals?

The WITNESS. Right.

Q. (By Mr. MACGUINEAS). In what form were those payments made?

A. By check.

Q. Of the respective carriers?

A. Yes, sir.

Q. Do you know what Lincoln Tidewater Terminals did with those checks?

A. They were endorsed on the back "Pay to the Order of the Treasurer of the United States," and signed "Lincoln Tidewater Terminal Corporation."

88 Q. Do you know whether those checks were actually collected by the United States?

A. They were.

Mr. COUSINS. What did you say?

The WITNESS. They were.

Q. (By Mr. MACGUINEAS). Since June 15, 1942, have there been reductions in the line haul rates on export and import traffic moving through Norfolk which compensated for the performance of wharfage and handling services by the Government at Army Base Piers 1 and 2?

A. There have been no general reductions for such purpose.

Q. If the Army traffic which actually moved over Army Base Piers 1 and 2 since June 15, 1942, had instead moved over the Lambert Point dock or over United Nations Depot, would the applicable tariffs have required the government to pay anything in addition to the applicable line haul rate to obtain shipside delivery?

A. No, unless the shipments moved from non-absorption territory, which were not shipside rates.

Mr. MacGuineas. That concludes the direct examination.

Exam. Disque. We will adjourn until 2:15 o'clock.

(At 12:45 p. m., hearing adjourned until 2:15 o'clock p. m.)

Afternoon Session 2:15 P. M.

Hays M. Heimbaugh, resumed the stand and testified further as follows:

89 Exam. Disque. You may cross examine.

Mr. MacGuineas. Mr. Examiner, before we proceed with the cross examination, I should like to reserve the right at this time to recall Major Heimbaugh later in the case for further testimony on another aspect which will more logically follow the testimony of other witnesses.

Cross Examination.

Q. (By Mr. Cousins). Major, I want to ask you a few questions about your Exhibit 4.

You mentioned page 23 as showing that certain payments were made as early as 1921 to the Army Supply Base, by which you mean Piers 1 and 2, that we are now talking about; is that so?

A. My testimony was that payment was made to the operator using the facilities known as the Army Supply Base.

Q. You did not mean to suggest that any payment was made to the Army or to any other governmental authority?

A. I did not mean to make such implication.

Q. In 1921 I take it the Army was not operating that base?

A. The base was operated by the operator named in this tariff, named Municipal Piers.

Q. Did the Army operate the base during the last war?

A. I do not know.

Q. You do not know?

A. I have no personal knowledge of the extent to which the Army operated Base Piers 1 and 2 during the last war.

90 Q. Now, you read numerous portions of this exhibit intending to show, I believe, that the absorption of certain charges at Norfolk was provided for in the tariffs of various railroads, but I do not recall that you stated explicitly that in every instance to which you referred to the practice of any railroad, the so-called absorptions were made only on specific piers named in the tariffs.

That is a fact, is it not?

A. It is difficult to make a blanket statement covering all of the tariffs. The wording in the tariffs varies from tariff to tariff.

Q. Look at page 17. That just happens to be the Norfolk-Southern. You read the first paragraph, but you did not refer, as I recall, to Rule 175, which shows where the provision applies.

It is a fact, is it not, that it applies on the piers named on that same page?

A. That is right. Item 175 names the terminals at which the rules and charges published in 180 of the tariff applies.

Q. That is generally true with respect to the tariffs of the other carriers; whereas, you read the statements with respect to absorptions, those tariffs do refer to the definite piers that the absorptions apply to and is not a general statement applicable to any pier in this harbor, is it?

A. I referred specifically in my testimony to specific piers.

Q. Why did you emphasize the present or recent
91 provisions with respect to Transport Trading and Terminal Company?

A. That is the company that operated Army Base Piers 1 and 2 immediately preceding the Army operation.

Q. Was your only purpose to show that when that company was operating the Army Base it did receive the payments from the railroads?

A. My purpose was to show that the railroad absorbed the wharfage and handling on shipments moving over those piers during the time when the services were performed, and operated by the Transport Trading and Terminal, and the carriers still hold themselves out to make those allowances to the extent the Transport Trading and Terminal should perform thoses ervices.

Q. If that company were operating the pier today, why, the tariffs would apply.

A. That is the same as I said.

Q. The same thing?

A. Yes, sir.

Q. When did the Lincoln Tidewater Terminal start operating on the property that you referred to as United Nations Depot?

A. I do not know.

Q. Do you know that it was operating there at the time payments were made to it which you have mentioned?

A. Yes, I know that.

Q. Do you know it was not operating some other pier at that time?

92 A. You mean in Norfolk Harbor?

Q. The Hampton Roads Harbor.

A. I know that the payments to which I referred were for shipments moving over that facility.

Q. How do you know that?

A. The checks from at least some of the carriers refer specifically to the bills rendered against them and those bills can be traced through the records and identified with the work that was done at that facility.

Q. Under what arrangement did Lincoln Tidewater Terminal turn those checks over to the Treasurer of the United States.

A. I did not understand your question.

Q. Why did the Terminal turn those checks over to the Treasurer of the United States?

A. That is the arrangement under which the facility was operated.

Q. All right. What is that arrangement?

A. I am not familiar with all its details, but in brief, or at least in so far as the payment of these wharfage and handling charges are concerned, they provide, as I indicated earlier, that those receipts will be turned over to the Treasurer of the United States and the checks are so endorsed.

Mr. MacGuineas. Whose checks?

The Witness. The checks that the railroads paid the Lincoln Tidewater Terminals.

93 (By Mr. Cousins). How is the terminal company compensated for the services it performs?

A. They are paid a specific amount by the Army.

Q. How much?

A. I do not know.

Q. Upon what is it based?

A. The payment?

Q. Yes.

A. The arrangement in effect now.

Q. What is the nature of it? How are they paid—so much per annum or so much per ton or what?

A. I am not familiar with the details of the payments made by the Army to the Lincoln Tidewater Terminal.

Q. You really do not know why the terminal endorsed these checks over to the United States, do you?

A. Yes, I do.

Q. Why?

A. Because that is the arrangement that is operating there.

Q. The terminal is not operating there to turn checks over to the United States and not get anything in return, is it?

A. They are paid by the Army. They are not doing that gratis. They are paid by the Army for, among other things, endorsing these checks that they receive from the carriers.

Q. What do they do on that pier?

A. I beg your pardon?

94 Q. What does the terminal company do on that pier?

A. They unload freight cars, put the lading on the floor of the pier.

Q. Is that all?

A. That is the service for which they are paid by the carriers.

Q. Is that all they do on the pier?

A. There are other operations conducted at the pier, and whether they do it or whether Army labor does it, I do not know.

Q. What labor unloads the cars to the pier?

A. I do not understand what you mean.

Q. Who unloads the cars on that pier?

A. Civilian labor to the extent it is available.

Q. And when not available?

A. As the General testified, if we have to draw on troops we do.

Q. Did the General so testify as to the United Nations—

A. My recollection is he did.

Q. You are saying that is the fact?

A. I am simply calling attention to what he said.

Q. Well, do you know?

A. Of my own knowledge?

Q. Yes.

A. I have not been there to watch the operations there, no.

Q. Do you know who employs the labor to unload the cars?

A. No, I do not.

95 Q. Do you know who pays the labor?

A. I do not know that.

Q. Of course, if it were soldiers, they would not be paid specifically by anybody.

A. No.

Q. Certainly not by the terminal company?

A. That is right.

Q. Do you know whether the Lincoln Terminal Company is permitted under its operation with the government to operate as a commercial pier operator on that pier independently of what it may do for the government?

A. There again, as I recall, the General stated the extent to which that can be done.

Mr. MacGuineas. I think the witness should be advised that he is not called upon to testify as to what a previous witness testified.

If he knows the facts, he may give the facts. If he does not know, do not purport to repeat what the previous witness said.

Q. (By Mr. Cousins). What is your answer?

A. I do not know.

Q. You do not know whether the Lincoln Tidewater Terminals actually operates that pier or whether it merely performs certain services such as unloading cars for the government?

A. What do you mean by "operating the pier"?

96 Q. As a pier operator.

A. I still do not understand your question.

Q. Do you know in any way what the duties or the rights of the Lincoln Tidewater Terminals are on United Nations Depot?

A. Their duties are to unload the cars.

Q. Is that all?

A. Whether they have other duties, I do not know.

Q. That would be the duty of the stevedore, would it not?

A. No.

Q. Would you not call that just a stevedore operation?

A. No.

Q. What would you call that, operating a pier or unloading cars?

A. That is car unloading.

Q. You would not call it operating a pier, would you?

A. Not the way the Army operates the piers.

Q. Who operates Army Base Piers 1 and 2?

A. The Army.

Q. All right. Who unloads the cars?

A. The Army.

Q. I am going to ask you those same two questions as to United Nations Terminal.

Can you answer the question as to that terminal in the same way as you have answered as to the Army Base?

Mr. MacGuineas. If you know the answer.

Mr. Cousins. Certainly.

97 The Witness. You ask the questions.

Q. (By Mr. Cousins). You told me that the Army operates Army Base Piers 1 and 2. Whatever you meant when you said the Army operates there, in the same sense I want you to tell me who operates the United Nations Depot.

A. I do not know. By operation of the pier I mean the entire operation of the pier.

Q. All right. The tariff that you read provides that certain absorptions will be made to pier operated by Lincoln Tidewater Terminal, does it not?

A. The tariffs do not provide for absorptions because of operation of the pier. They provide for the absorptions to make shipside delivery or for wharfage and handling.

Q. Why should the railroads pay the Lincoln Tidewater Terminal 20 cents a ton wharfage if that company does nothing but unload cars?

A. I do not know.

Q. Who operated the United Nations Depot before Lincoln did?

A. I do not know.

Q. Maybe I have already asked you this, whether you know if the Lincoln Tidewater Terminal handles commercial freight independently of any work that it does for the government?

Mr. MacGuineas. The witness has already answered.

The Witness. I do not know.

Q. (By Mr. Cousins). You said you did not know that?

98 A. Right.

Mr. Cousins. That is all.

Q. (By Mr. Reynolds). You referred to the fact that in May, 1943, the Atlantic Coast Line Railroad paid the Lincoln Tidewater Terminal $544.68 for wharfage and handling; is that correct?

A. Right.

Q. Was that the only instance you testified of which the Atlantic Coast Line made any payment to the Lincoln Tidewater Terminals for wharfage and handling?

A. I did not.

Q. Was that the only instance you found in which the Atlantic Coast Line Railroad made any payment to the Lincoln Tidewater Terminals for wharfage and handling?

A. No. The Atlantic Coast Line has made other payments.

Q. Can you give me some of the other instances?

A. I can not give it to you. I read from a memorandum I prepared before I came in. I do not have the other instances here.

Q. Are you certain that there were other instances in which the Atlantic Coast Line made the payments?

A. Yes, I am.

Q. Do you know whether or not the Lincoln Tidewater Terminals billed the Atlantic Coast Line for $544.68 for wharfage and handling?

99 A. I do not know.

Q. Do you know whether or not the shipments for which that sum was paid were shipped prepaid or shipped collect?

A. I do not know.

Q. Do you know whether or not the shipper—that is, the consignor, added the $544.68 to the amount he paid the railroad in addition to the line haul rate?

A. I do not know.

Q. Do you know whether or not the shipper—that is, the consignor, added the $544.68 to the amount he paid the railroad in addition to the line haul rate?

A. I do not know.

Q. Do you know whether these government shipments that are made to the Army Base are made on domestic or export bills of lading?

A. They are made on government bills of lading, so far as the Army is concerned, on the Army traffic.

Q. Domestic bills of lading?

A. Government bills of lading. I did not see the Government bill of lading made.

Q. What notice, if any, does the Government give the railroads that any particular traffic moving into the Army base is intended for export?

A. The bill of lading, when it is made out, shows that.

Q. In what respect does it show that? How does it show?

A. Some of them say specifically "for export," or they do release numbers—they have release numbers, in any event.

Q. What do you mean "in any event"?

A. I will say it this way: All of them have the
100 release permit, the release number, which is essential, which is a prerequisite to making an export shipment. That notice shows it is for export.

Q. What is a release?

A. A permission you must obtain to make shipments to a port for export.

Q. Obtained from whom?

A. It depends on whether it is Army or Lend-Lease. The O.D.T., I believe, issues the release.

Q. Did I understand you to say then that any shipment which has an O.D.T. number on it is an export shipment?

A. The ones that have the QMR release numbers are export shipments, and, in addition, the bills of lading in almost every case show "for export" in so many words.

Q. They have not those words on them, "for export"?

A. They do, right.

Q. Have you examined any bills of lading to determine whether that is a fact?

A. I have. In addition, many of them have the overseas code designation which the Army requires the Army Depot or the manufacturers for the Army to put on the bill.

Q. Have the railroads been advised as to the meaning of the code?

A. You mean what a given code means as to the exact overseas destination?

Q. Have the railroads been advised that certain
101 code numbers means a shipment is to be expected?

A. The Army does not tell any one what the code numbers mean. The Army does not say that a certain code means a shipment is going to the Mediterranean, for instance.

Q. Does the government say that a certain code number means that a shipment is to be exported?

A. There is a variety of code numbers.

Q. That is my information, too.

A. That is right, but they are all readily identifiable by people who handle the shipments from day to day, whether they are in the railroad service or in the Army service as identifying that shipment as an export shipment.

Q. That is just a conclusion of yours?

A. No.

Q. I will ask you, has the railroad ever been advised that a code number means that a shipment will be exported?

A. The Army would not say to any one what the meaning

of a code number is as regards overseas destination. That is the reason for putting a code number on.

Q. I am not asking you whether it is North Africa, Italy, or any particular destination. What I am asking you is if the railroads have been notified that a certain code number means that a shipment is to be exported.

A. What do you mean by "notified"?

Q. Advised, informed—any of those words.

102 A. Yes.

Q. By whom?

A. The local people at the port of embarkation.

Q. How do you know that?

A. I know that because in working out these operating arrangements, such as the one with the Belt, the railroad men have to be apprized of these details just as well as the Army personnel. Your employees operating around the port of embarkation are all screened for security reasons and they know when these shipments are for export.

Q. Can you tell me who connected with the railroad was so advised and by whom he was advised?

A. By name?

Q. Yes.

A. No.

Q. Or office or title?

A. I say that the Army local people at port of embarkation have apprized the railroad local people at port of embarkation. That is what I mean by notification. That is why I asked you what you meant by notification.

Q. I asked you how do you know that to be the fact? Did you hear them advise the railroad people that a certain code number meant that shipments were to be exported?

A. No.

Q. Did you see any correspondence in your office

103 in which that advice was contained?

A. No.

Q. To be perfectly frank about the matter, that is just a conclusion of yours, is it not?

A. No.

Q. What is it, then?

A. Well, it is notification, as I understand notification.

Q. You just assume that the notice has been extended. You said you had not heard it extended, you have not seen it extended, that is, seen any correspondence in which it was extended.

How do you know that that is correct?

A. I have talked with our local people and I have talked with them about this particular point.

Q. Which one of your local people did you talk to?

A. I talked with our people here in the Port of Embarkation several times.

Q. I am asking you which ones?

A. I can refer to Captain John W. Gillis, assistant transportation officer.

Q. What you have told me is based on a statement he made to you?

A. In part.

Q. What else is it based on?

A. I say he is the only one I talked with around the port. I raised that particular question myself.

104 Q. There are some shipments that go to the Army Base that are never exported; is that not the fact?

A. I do not know.

Q. Do you know what kind of bills of lading, whether export or domestic, these so-called commercial shipments moved on?

A. I do not know.

Mr. REYNOLDS. I have not anything further.

Q. (By Mr. DIXON). Are the rates and the regulations shown in your exhibits those presently in effect?

A. Right.

Q. I take it that to the extent indicated those rates, rules, rules, and regulations apply on this traffic that moves over Army Base Piers No. 1 and 2?

A. I do not understand your question.

Q. The rates shown in your exhibit to Norfolk apply on this government freight that moves over piers 1 and 2?

A. Yes, sir.

Q. These terminal arrangements would not apply because they are not so indicated?

A. The Army is not shown by name in the terminal tariff.

Q. Can you tell us to what extent any of these rates or regulations have been superseded by Section 22 quotations which have been made to cover?

A. We have no Section 22 quotations covering wharfage and handling at Norfolk.

105 Q. Have you any Section 22 quotations that cover line haul rates to and from Norfolk?

A. Yes, sir.

Q. And to the extent such quotations are outstanding, they would apply in preference to the rates shown in these exhibits?

A. To the extent that lower charges would prevail by application of Section 22, that is correct.

Q. That is correct, is it?

A. That is correct.

Q. Now, all of this stuff moves under government bills?

A. The Army traffic does.

Q. It is, therefore, subject to land grant?

A. Right.

Mr. MacGuineas. I object to any questions along that line. That is not relevant to the issues in this case.

Mr. Dixon. He has already answered the question.

Exam. Disque. He has already answered the question.

Mr. MacGuineas. I move to strike the answer as an answer to a question which is immaterial.

Exam. Disque. If it is immaterial, it will not be considered.

Mr. Dixon. That is all.

Q. (By Mr. Chaffee). I note on page 16 of your Exhibit No. 3, an item from the Jones' Tariff providing for export rates to Norfolk by the Chesapeake & Ohio Railway as delivering carrier, and that they do not include
106 wharfage, handling, or other charges except switching.

Is that same restriction not in effect in connection with all export and import rates via the Chesapeake & Ohio as delivering or originating carrier at Norfolk?

A. I did not check it for all export rates. I noticed it in other tariffs.

Q. Do you know of any tariff in which the converse would be true or is true?

A. I can not name one at the moment.

Mr. Chaffee. That is all, thank you.

Re-direct Examination.

Q. (By Mr. MacGuineas). Just one question on re-direct examination. Can you tell us whether a substantial portion of the traffic presently moving over Army Base Piers 1 and 2 is subject to Section 22 quotations?

I mean, generally, do you know whether that covers a large part of the traffic or a small part?

Exam. Disque. What do you mean by "subject to"?

Mr. MacGuineas. Traffic the rates on which would be covered by outstanding Section 22 quotations.

The Witness. I can answer your question in this way: There are a variety of Section 22 quotations. I do not recall any that apply to Norfolk solely. To the extent that

we have Section 22 quotations that cover the country as a whole, they provide for no greater deduction from
107 the commercial rates on shipments destined to Norfolk than on shipments destined to any other port; therefore, the deduction received by reason of the Section 22 quotations can not be attributed as a reduction designed to make compensation for wharfage and handling at Norfolk.

As to the proportion of traffic that moves on Section 22 quotations, that question is almost impossible to answer unless you take the tonnage for a given day and have the auditor run the whole thing back.

There simply is no way to make a general statement as to what proportion of traffic is subject to Section 22 quotations.

Mr. MacGuineas. That is all.

Q. (By Exam. Disque). Are you claiming this 3 cent deduction on traffic that does move subject to Section 22 quotations?

A. Yes, sir.

Q. That would depend on the quotation, would it not, rather than the tariff?

A. Unless the quotation is specifically stated as a line haul rate. The tariff might state that the rates to be derived thereunder would not include wharfage and handling at Norfolk. Wharfage and handling would be allowed under an application of the line haul tariff from which the Section 22 provides deduction as modified, if at all, by the terminal tariffs applying at Norfolk.

Q. You mean that is the way you would construe it?

108 A. Right.

Q. (By Mr. Dixon). Think for a minute about all this military traffic which goes through these Army Depots under transit, that transit being covered by Section 22 quotations—

A. Yes.

Q. —there would be a tremendous volume of that, would there not?

A. Again I can not answer your question unless you take a particular day or a particular time.

Mr. Dixon. That is all. Thank you.

The Witness. There is no way at all.

Mr. Dixon. That is all right.

Q. (By Mr. Winn). What form do these Section 22 quotations take? Do they take the form of stating the applica-

ble published tariff rates with a certain deduction so that you would go to the line haul tariff to find out what the Section 22 quotation means and how it is applied, giving effect to the quotation deduction? Is that the way it is worked?

A. On Section 22 quotations, you take almost any form that the issuing carrier or issuing agent desires to use.

Q. If that is so, how do you determine whether a terminal allowance tariff or service tariff applies or does not apply to a Section 22 quotation rate?

A. If we have a Section 22 quotation, for instance, that in effect names a column rating, all that does is name
109 the column rating.

Q. It refers to the tariff in order to find out what the rate really is?

A. Or the territory.

Q. So that under the Section 22 quotation, you work back to the tariffs immediately to find out what line haul rates, with the terminal charges are applicable with the rules to apply?

A. As a rule on line haul quotations, that is true. In fact, a great number of Section 22 quotations state that specifically as a more or less common item, similar to the terminal facility item that you see in the line haul service.

Q. What is it that they carry as a common item?

A. That the provisions of this quotation modify the terms of the tariff only to the extent set out in the quotation.

Exam. DISQUE. How can you ask the Commission to make any finding on a Section 22 rate?

The WITNESS. We are not. We are asking you to make a finding on the tariffs that are lawfully on file with the Commission.

Exam. DISQUE. It looks to me like you are trying to make the Commission find in connection with a Section 22 rate. Do you want us to take the terminal charge off of the Section 22 rate?

The WITNESS. To the extent it applies, to the ex-
110 tent the carriers say they do not want that done.

Q. (By Mr. WAGNER). Major Heimbaugh, when you negotiated your Section 22 contract at Newport News, did that have any relation at all to the Interstate Commerce Act other than Section 22?

A. Section 22 simply says that carriers are not prohibited from making reduced rates.

Q. You entered into a contract with the Chesapeake & Ohio—and when I say "you" I mean the United States

Government—in which you got an allowance of 50 cents a ton.

If I am correct, that had no relation to any contract on file with the Interstate Commerce Commission, did it?

Mr. MacGuineas. This is going beyond the scope of the direct examination. This witness did not testify with respect to the arrangement with the C & O. That was General Kilpatrick, and he is the appropriate witness to be cross examined, if it is to be done.

Mr. Wagner. Do you not want to get the facts presented to the Commission?

Mr. MacGuineas. Certainly, in the proper way.

Mr. Wagner. I am trying to get them in in the proper way. The General does not know one thing and this witness does not know another.

I am not interested in this controversy at all except that I do not want the terminal charges separated from the line haul charges. That is the only interest I have in this proceeding.

111

When you come to your Newport News situation you have an allowance out of the Chesapeake & Ohio for the service performed by the United States Government, am I right?

Mr. MacGuineas. I renew my objection that these questions are beyond the scope of the direct examination.

Exam. Disque. Is some other witness going to go into that matter?

Mr. MacGuineas. The General went into it this morning. He was available then for cross examination.

Exam. Disque. The main thing is, does Major Heimbaugh know the answer to the question?

That is all I am interested in. Do you know the answer or not?

The Witness. I am not clear yet as to what his question is.

Mr. Wagner. Here is my question:—

Exam. Disque. I do not know whether it is cross examination or or not.

Mr. Wagner. I do not, either. I am not interested in whether it is cross or direct.

Q. (By Mr. Wagner). You made one arrangement at Newport News under which the Government received an Allowance from the Chesapeake & Ohio Railroad for wharfage and handling, or for handling, is that not true?

112

A. We get it for handling. That is obtained under a contract, not a Section 22 quotation.

Q. I get you. It is under Section 22, but regardless of whether it is or not, it is not a published tariff allowance?

Mr. MacGuineas. I renew my objection.

Exam. Disque. I am not interested in the cross examination stage of it. I am interested in knowing whether or not the witness knows the answer.

Mr. MacGuineas. I am entitled to a ruling.

Exam. Disque. I will overrule the objection.

Mr. MacGuineas. Exception.

Q. (By Mr. Wagner). At Norfolk the railroads have refused to allow the Government anything for wharfage and handling at the Army Base?

A. Right.

Q. That differentiates Norfolk and Newport News.

Is it not true that the same line haul rates apply—I am talking about export now—to the same ports?

A. In general.

Q. Newport News and Norfolk?

A. In general they do.

Q. At Norfolk you perform the service and the railroads refuse to allow anything for the service you performed?

A. That is correct.

113 Q. At Newport News you get 50 cents a ton out of the same line haul rate from the same point, is that not true?

A. That is true.

Mr. Wagner. That is all.

The Witness. May I make this statement respecting Section 22 quotations?

Exam. Disque. Yes.

The Witness. In general, Section 22 quotations form of publication, if you may call it that, are made because the carriers elected to use that method rather than to put in the tariff. If they want to put these arrangements in the tariff, that is all right with us, but they chose the Section 22 method of providing a bases of rates for their convenience or for reasons of their own.

Exam. Disque. Any other questions?

Q. (By Mr. Dixon). By virtue of that method, the Government gets the benefit of lower charges than the general run of commercial traffic, does it not?

Exam. Disque. That is what Section 22 means, yes.

Q. (By Mr. Dixon). Is that right, Major Heimbaugh?

A. That question depends on the quotation. You are talking about many other things. For instance, to the extent that Section 22 quotation is favored, as many of them are, and are in effect, which says that the basis will be perhaps Column 65 with the *ex parte* 148 increase
114 added, we are paying more under Section 22 quotations than if Column 65 had been published in a tariff.

Q. But less than the commercial shipper pays from the same point?

A. Only because there is no commercial movement.

Q. Well, take traffic of which there is a commercial movement by and large.

A. Then you ordinarily have rates.

Q. Ordinarily your Government quotations are lower than the commercial charges, are they not?

A. You do not name the quotation where there is an adequate line of column rates. There is no necessity for it.

Q. By "adequate" you mean low?

A. Rates that were made to take care of a commercial movement of traffic.

Mr. WAGNER. There would not be any sense in a Section 22 rate unless it was lower than the tariff rate, would there?

Exam. DISQUE. Can not the lawyers agree that Section 22 is not in this case?

Mr. DIXON. No.

Mr. WAGNER. We think it is. Section 22 rates must be lower than the tariff rates, or there would not be any tariff rates.

Mr. DIXON. Section 22 rates are not subject to the jurisdiction of the Interstate Commerce Commission. The
115 lawyers ought to be willing to concede that on both sides of the table.

Exam. DISQUE. That is what I mean to say.

Mr. DIXON. And readily.

Exam. DISQUE. I will so rule.

Let us proceed with the hearing.

Mr. COUSINS. I have one question.

Q. (By Mr. COUSINS). I understood from what you said in the last few minutes you are really familiar with the contract between the Government and the Chesapeake & Ohio, is that correct?

A. What do you mean by "familiar"?

Q. Well, you declined to tell me anything about the contract between the Government and the Lincoln Tide-

water Terminals, but now you have been willing to discuss the arrangement with the Chesapeake & Ohio, and I assume, therefore, that you know more about the latter than you do the former?

A. The gentleman spoke only again of what the General spoke of this morning and that is all. I commented about I have no working knowledge of the C & O contract.

Q. What you have been saying is based on what you heard the General testify to this morning?

A. Right.

Q. I thought your counsel instructed you to decline to do that.

A. He did.

116 Mr. MacGuineas. I would like the record to show that I tried to avoid these questions being put to the witness, and I was overruled.

Mr. Cousins. You are talking about Section 22 rates?

Mr. MacGuineas. I am talking about the C & O contract.

Q. (By Mr. Cousins). Major Heimbaugh, how did the Government come out on this deal with the C & O?

A. I do not know.

Q. After they have paid the labor and then get 50 cents from the C & O, what is the result? Do they make a profit or are they in the red?

A. I do not know.

Q. You do not know whether it would be better for the Government to let the C & O pay its own labor and not get a 50 cent rebate?

A. I do not know that.

Mr. Cousins. All right. That is all.

Q. (By Mr. Chaffee). In connection with that Chesapeake & Ohio contract at Newport News, are you familiar enough with that contract and with the contract at Norfolk to say whether or not in all respects other than the allowance to the Government the contracts are substantially the same?

A. I do not know. I have not read the contracts. I do not know what their points of similarity are, if any, or their points of difference.

117 Q. So that the 50 cent allowance may or may not be comparable to something that the contracts on the Norfolk side express in a different way?

A. Again I do not know. I do not know how the 50 cents was arrived at. I do not know how they got at the arrangement they have with the Lincoln Tidewater Terminals.

Mr. CHAFFEE. That is all.

Mr. MACGUINEAS. One question, Major Heimbaugh.

Q. (By Mr. MACGUINEAS). Is it correct or is it not correct that the negotiations and the carrying out of the C & O contract is no part of your official duty?

A. That is absolutely correct.

Mr. MACGUINEAS. That is all.

(Witness excused.)

Mr. MACGUINEAS. I will offer in evidence Complainant's Exhibits 3, 4, and 5, which have been identified by this witness.

(Complainant's Exhibits 3, 4, and 5, Witness Heimbaugh, received in evidence.)

JAMES HENRY DEVEREUX, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. MACGUINEAS). Mr. Devereux, will you state your present position with the Government?

A. I am at the present time associated with the War Shipping Administration, acting as Special Assistant
118 to the District Manager, South Atlantic District.

Q. Will you describe briefly your duties in that position?

A. Primarily act as liaison between the War Shipping Administration and the Hampton Roads Port of Embarkation, in addition to that supervising the loading of lend-lease ships at Norfolk, Wilmington, North Carolina, arranging for space for non-Army or Navy shipments on vessels assigned to the Army for loading, and such other special duties as Mr. Blair, the District Manager, assigns to me.

Q. When did you assume your present position with War Shipping Administration?

A. On August 3, 1942.

Q. Previous to that time, had you been engaged in traffic activities in the Port of Norfolk?

A. Yes, sir.

Q. For how many years?

A. Since August, 1922, when I first came here.

Q. Describe the various occupations and positions in which you have been engaged since 1922.

A. From August, 1922, until June, 1931, I was manager of the local office at Norfolk and Newport News of the Norton Lilly and Company, Steamship Agents, with their main office in New York City; also manager of the Norfolk and Newport News office of Cory Mann George Corporation.

Wholesale coal exporters, whose main office is located in New York.

In October, 1931, I became associated with the
119 Freight forwarding firm of Norton & Ellis, Incorporated, as secretary-treasurer, and at the same time with the Southern Stevedoring Corporation, doing a general ship loading and unloading business, as vice president. I have been with both of these corporations since that date, becoming president of each corporation in January of this year, but I am on temporary leave of absence in order to work with the War Shipping Administration.

Q. Mr. Devereux, will you describe for the record Army Base Piers 1 and 2 in terms of physical facilities for handling export and import traffic?

A. The Army Base terminals consist of two rather modern concrete piers approximately 1200 feet in length each, with aprons on both sides of each pier wide enough to accommodate two marginal railroad tracks.

There are sunken tracks running down the center of each pier. The two piers are separated; I do not know the exact distance, but I do know it is wide enough so that lighters can work alongside the steamers at these piers without interfering with traffic going up and down the slips.

Pier No. 1 is equipped with two 10-ton gentry cranes on the north side; Pier 2 with one 25-ton gantry crane on the southside.

The inshore end of the piers is concreted with concrete roadways connecting various warehouses situated further inland.

120 Q. Are there actually marginal tracks on the piers?

A. There are.

Q. On how many sides of the piers?

A. On each side of both piers.

Q. How many cargo vesels can be accommodated at both piers and worked simultaneously?

A. I would say that eight modern cargo vessels can be docked at the two piers at one time and worked to advantage.

Q. Are both piers covered?

A. Both piers are covered.

Q. Who owns Army Base Piers 1 and 2?

A. The United States Government.

Q. When were they built?

A. They were started some time during the last war and completed, as I understand it, after the war was over. I

was not here at that time, so I do not have the exact figures.

Q. Since you have been stationed at the port, what different organizations have operated the Army Base Piers?

A. The City of Norfolk was the first operator. They operated until some time in 1925, I believe in September, at which time the Norfolk Tidewater Terminals took over the operation and continued until July 1, 1940, at which time the Transport Trading and Terminal Corporation took over the operation.

Transport Trading and Terminal continued until such time as Pier 2 was taken over by the Navy. They then
121 continued to operate Pier 1 until such time as that pier was taken over by the Army.

Q. Since the summer of 1942, is it correct to say that both piers have been actually operated by the Army?

A. I do not think the Army started actual operation of Pier 2 until some time either late in 1942 or early in 1943. The Navy was operating it for a period of that time.

Q. Mr. Devereux, before the Army took over the base piers, was there a consistent practice of the carriers with reference to the unloading of cars on to pier tracks?

A. Yes, there was.

Q. Can you state what the customary practice of the carriers was?

A. The customary practice of the carriers was to place the cars on box car freight, inside of the piers adjacent to the berths at which the steamer would dock and load and unload the freight from these cars and place it on the pier in what is commonly known as the ship's loading berth.

Mr. COUSINS. What piers are you talking about?

The WITNESS. Piers 1 and 2, Army Base.

Q. (By Mr. MACGUINEAS). What about import traffic, how was the loading of that handled?

Mr. COUSINS. I object to the question, as I should have to the last one, unless the witness is qualified to talk about the operation of this pier prior to his connection with
122 the Government.

The WITNESS. What do you mean by "qualified"?

Q. (By Mr. MACGUINEAS). Let me put the question: Have you been familiar since 1922 with the actual mode of operation of Army Base Piers 1 and 2?

A. I would say that I have.

Mr. COUSINS. How? What did you have to do with it?

The WITNESS. I had vessels down there for which I was agent, loading and discharging. I spent a great deal of time down there when they were loading and discharging.

Mr. COUSINS. You are talking about vessels?

The WITNESS. I am talking about vessels.

Mr. COUSINS. You have not had any connection with the pier operator?

The WITNESS. I had none other than seeing that the cargo was taken off the pier or put on the pier.

Mr. COUSINS. How do you know who took the car out and put it on the pier?

Mr. MACGUINEAS. No question has been asked as to who took the car out and put it on the pier.

Mr. COUSINS. I understood the witness to say that the railroad took the car to the pier.

Is that not what you said?

The WITNESS. That is correct.

Mr. COUSINS. How do you know that they moved
123 it out and put it on the pier? You did not always see the railroad power attached to the car, did you?

The WITNESS. No.

Exam. DISQUE. Does the tariff answer all these questions? Does the tariff any place say who does the loading and unloading?

Mr. MACGUINEAS. The tariff may say. I was supposed to do it, if I may, by the witness. I am showing what was actually done. If counsel wants to cross examine, he may do so at the proper time, but I wish to continue with my examination.

Mr. COUSINS. I object to the question until he qualifies. There is no use getting a lot of miscellaneous information in the record.

What he has said so far is inaccurate. Nobody in this case has said that the railroads went on to that pier and unloaded a car as this witness said.

Mr. MACGUINEAS. I wish to continue my direct examination.

Exam. DISQUE. I would like to check what he says with the tariff to see if what he says is correct.

Mr. MACGUINEAS. Major Heimbaugh covered that. Major Heimbaugh referred to the tariff provisions in the past.

Mr. COUSINS. He pointed out numerous provisions, not one of which said the railroads would unload a car on the pier.

Exam. DISQUE. Let us see about it.

Mr. MACGUINEAS. My question is: Since 1922 what
124 has been the consistent practice of the carriers with reference to the loading of import freight on to cars and on to the pier tracks?

Mr. COUSINS. Objected to on the ground that the witness has not qualified.

Exam. DISQUE. He asks: What has been the practice of the railroads.

Answer the question.

The WITNESS. The practice has been for the agent of the vessel, though the stevedore, to arrange for the discharge of the freight from the vessel on to the pier floor, at which point the terminal operator would pick the freight up and load it into railroad cars.

Q. (By Mr. MACGUINEAS). Since 1922 has it been the consistent practice of the carriers to perform both the carloading and the car unloading through terminal operator?

A. It has been.

Mr. COUSINS. Objected to.

Exam. DISQUE. The tariff will answer that question.

Mr. COUSINS. This is not a tariff man.

Exam. DISQUE. How does he know who was doing it? Did he see it done and who was doing it?

Mr. MACGUINEAS. Cross examination can bring that out if he feels it necessary.

The WITNESS. I paid bills for having it done.

Exam. DISQUE. By whom?

125 The WITNESS. I received invoices from the terminal operators for wharfage and handling as freight forwarder on traffic I sent down there for export.

Exam. DISQUE. And it was your traffic and you know that the terminal company has been unloading and loading this freight for the railroads?

The WITNESS. That is correct.

Exam. DISQUE. All right.

What is next?

Mr. COUSINS. I move that the answer be stricken from the record as being without basis of qualification.

Exam. DISQUE. Proceed.

Q. (By Mr. MACGUINEAS). Mr. Devereux, are you familiar from your own observation with the practice which the Army has been using with reference to loading and unloading of cars on the Army Base Piers since the Army took over?

A. In so far as the type of labor being used, yes, sir.

Q. And the manner—

A. And the manner in which it has been done, yes.

Q. Is there any difference in the actual manner in which the cars were unloaded on to the pier floors when the

operator did it, the terminal operators, than the manner in which the Army is now unloading those cars on to the pier floors?

A. No.

Exam. Disque. You are talking about the physical
126 work now?

Mr. MacGuineas. That is right.

The Witness. Yes.

Q. (By Mr. MacGuineas). Mr. Devereux, since the summer of 1942 when the Army took over the base piers, and at the present time, what other facilities are available in the Norfolk harbor for the handling of general export and import cargo?

A. The Norfolk & Western Export Pier at Lambert Point, Piers O and L, and Pier 4, Pinners Point, Portsmouth, owned by the Southern Railroad.

Q. Describe the physical set up of both the Pinners Point and the Lambert Point piers.

A. Pinners Point consists of one pier some eight to nine hundred feet in length, a wooden structure, marginal track on the southside, a rather narrow apron, dredged to approximately 30 feet, capable of handling a modern cargo vessel loaded to its deepest draft.

Q. Did you say capable or incapable?

A. Capable. The north side of the pier has not sufficient depth of water to permit the loading of modern cargo vessels to drafts that they go out in today's operations. There are sunken tracks in the center of Pinners Point pier.

The Lambert Point piers consist of Pier L, 1200 feet in length, single marginal track on the south side, no marginal track on the north side, sunken tracks in the middle;
127 and Pier O, some eight hundred to 850 feet in length, with a marginal track on the south side and no water or berthing facilities on the north side.

Q. What mechanical equipment do these two piers, Pinners Point and the Lambert Point docks have for loading and unloading ships?

A. None.

Q. Mr. Devereux, have you made a study to determine whether or not the volume of traffic that has been and is now being handled over Army Base Piers 1 and 2 could be handled over the Lambert Point dock and the Pinners Point pier?

A. I have

Q. Will you state the conclusion which you reached from that study?

A. My study was for the year 1943 on the basis of traffic which moved over the Army Base Piers during that year. I would say that approximately 37 per cent could have been handled at the Pinners Point and Lambert Point piers.

Mr. WAGNER. May I have that statement repeated?

(The last answer was read by the reporter.)

Mr. WAGNER. In other words, if the Army base had been closed?

Mr. MACGUINEAS. You better answer that audibly.

The WITNESS. Yes.

Q. (By Mr. MACGUINEAS). At the Lambert Point
128 docks, what is now the practice of the carriers in unloading cars for export traffic?

A. The cars are unloaded by the terminal operating company.

Q. What is the name of that company?

A. Lambert Point Docks, Inc.

Q. Is there any difference in the manner in which that unloading service is performed at the Lambert Point Docks and the manner in which it is being performed by the Army at the Army Base Piers?

Exam. DISQUE. What do you mean by "unloading"? Do you mean the mere physical effort of taking the stuff out of the cars or bringing the cars on to the dock and so forth?

Mr. MACGUINEAS. I refer to the removal of freight from the car when it is on the pier track and placing that freight on to the pier floor within proximity of the ship's berth, as the witness testified.

Q. (By Mr. MACGUINEAS). Are you answering in terms of that?

A. There is practically no difference. There is no difference.

Q. Well, now, at United Nations Depot, how is the loading and unloading of the cars performed at the present time?

A. I am only familiar with the Air Corps part of it down there, which I know is handled through Lincoln Tidewater Terminals.

Q. Is there any difference in the manner in which the cars are unloaded by the terminal operator at United
129 Nations Depot than the manner in which the unloading service is being performed by the Army at the Army base piers?

A. The physical part of it? No.

Q. It is equally true that the loading of cars of imported traffic is handled in the same way by the terminal operators at United Nations Depot and at Lambert Point dock as it is now being handled by the Army at the Army Base Piers?

A. Yes.

Mr. MacGuineas. That is all.

Cross Examination.

Q. (By Mr. Cousins). What kind of shipments are going over the Lambert Point Dock?

A. Some lend-lease shipments to the United Kingdom, and some Russian lend-lease shipments to other destinations, import business from India, Africa, and other foreign countries.

Q. Where is this Pinners Point Pier that you told us about?

A. It is in Portsmouth, on the other side of the river.

Q. Operated by whom, did you say?

A. Owned by the Southern Railroad; operated by Norfolk Tidewater Terminal.

Q. What kind of traffic is going over that pier?

A. Some returned Army cargo, some newsprint, sugar, and other classes of what we might call general cargo.

Q. Import, export, or what?

A. Most of what they have out there has been
130 import cargo. Very little export.

Q. Now, export cargo, I assume, is going out from the United Nations Depot?

A. Yes, sir.

Q. Those are the only piers in Norfolk, with the exception of the Army Base, that are handling export traffic?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. Has that always been so within your time?

A. No. At one time the Imperial Tobacco Company had its own terminal in Berkley, where it handled their tobacco and occasionally a few shipments for other shippers. The Southgate Terminal at the foot of Tazewell Street was used at one time for intercoastal freight.

Q. I am talking about export traffic.

A. That was also used occasionally for export traffic. The Norfolk Warehouse Corporation pier was used for the exportation of cotton.

Q. Those three are not used for export business today?

A. No, they are not.

Q. Any reason why they could not be?

A. Well, the Norfolk Warehouse Corporation's terminal has been outgrown by the size of the ships. You can not get a vessel in there today without it sticking out in the stream 150 feet, which is dangerous to the vessel
131 and contrary to harbor safety regulations.

The Imperial Tobacco Terminal was built primarily for tobacco and is not in any sense of the word a general cargo terminal. It was built to handle one commodity and one commodity only.

The Southgate Terminal pier is fed only by one railroad, the Chesapeake & Ohio, and it is a rather small terminal and except for small lots of freight could not be used to advantage in present day operations where all of our movements are practically full cargo vessels. That was used in the days when ships came in and picked up three, four, or five hundred pounds.

Q. The fact that the railroads undertook to absorb the handling charges of those piers does not have much effect one way or the other with respect to export traffic? They might just as well be cancelled out of the tariff?

A. That is correct. They are not being used.

Q. Look at the map, Exhibit No. 2, Mr. Devereux. If we call north the top of this map—

Mr. MacGuineas. The direction arrows are on the map. Would they not refer to the true direction?

Mr. Cousins. That is the best I can do. Put it the other way.

Q. (By Mr. Cousins). If you call the north end the top of this map, the piers that you call the United Nations Depot are almost up at the top of the map numbered 6
132 and 7, is that so? I should have said 9.

A. 9, yes, sir.

Q. Is that correct,—9?

A. That is correct.

Q. Who owns those piers?

A. The Norfolk and Western Railroad.

Q. Who has possession of them now?

A. They are under lease to the United States Army.

Q. Do you know why they are designated on this exhibit as Lincoln Tidewater instead of United States Army or whoever has control of them?

Mr. MacGuineas. This witness did not prepare the map. He is not competent to testify as to why somebody else prepared the map in a given way. If you want testimony on

that I will be glad to supply the witness, but this is not the witness.

Q. (By Mr. Cousins). Do you know?

A. No. All I do know is that when the Lincoln Tidewater Terminal stopped operating down there, they painted their name across the face of the pier.

Q. Did you say "stopped" operating or "started" operating?

A. Started operating.

Q. Have you anything to do with the arrangements between the Lincoln Tidewater Terminal and the Government on that pier?

A. Nothing whatsoever.

Q. Did you have any relations with the Lincoln
133 Tidewater Terminal?

A. None.

Q. You said that freight over which you have charge moves on that pier, did you not?

A. Yes. I can have access to a berth at that pier only through the Army with whom I make all the arrangements for berthing of vessels down there.

Q. You do not make your arrangements with the Lincoln Tidewater Terminal?

A. No.

Q. Now, the Army Base about which we are talking I think is shown on this map as Piers 12 and 13, is that correct?

A. That is correct.

Q. You described the two piers that extend out into the water and possibly you described those next dark objects as warehouses, did you, or are those warehouses back of the piers?

A. Back of the piers are warehouses.

Q. Well, as you get back of that, there are some diagonal lines. What are they?

A. They are—I do not know the date of this map—a number of spurs from that track run through there and the Navy at the time it was operating one half of the terminal put up a number of warehouses which, I think, they are still using.

Q. That is on the Army Base property, is it?

A. That is on the Army Base property.

134 Q. Then we have some tracks under which says "U. S. Army Base Yards." I take it, therefore, the property of the Government extends almost over to the

edge of this map where a connection is shown with the Virginian Railway; is that correct?

A. I do not know how far the Army Base extends.

Q. Are those tracks called Army Base Yards a part of the property of the Base?

A. The ownership of that yard I do not know.

Q. Do you know where the Norfolk Belt Line comes in there?

A. I have been to that point, yes, sir.

Q. Where is that point on the map?

A. It shows almost over on the right hand side, and also that comes in farther up where the line leads into the United Nations Depot. There are two entrances by track.

Q. Now, when the Belt Line is bringing in a string of cars for the Army Base, where does it place them with respect to those tracks?

A. I do not know. I have no control over that movement.

Q. You do not know?

A. I have nothing to do with it.

Q. I thought you said a few minutes ago that the railroads took the cars down to the pier.

A. I said in private operation. I did not say anything about what the railroads were doing with it now. My testimony was to the operation prior to the time the Army took the terminals over.

135 Q. But you do not know whether cars are placed for the Army Base now by the railroads?

A. I do not.

Q. You do not know who switches the cars from the yard down on to the piers, do you?

A. Except by what I have seen on the locomotives.

Q. What does it say?

A. One of them says "U. S. Belt Line Railroad" and several of the others "U. S. A. B." I think it is.

Q. Did you mean to say U. S. Belt Line Railroad?

A. Norfolk.

Q. You have seen one locomotive of the Belt Line and several of the Army Base moving cars?

A. Yes, sir.

Q. Did you hear General Kilpatrick testify?

A. Yes, sir.

Q. Are you not the man that he told me to get to tell me about this operation?

Mr. MacGuineas. I object to that question. The General did not say who could tell about it. In the first place, it is not proper to ask this witness what General Kilpatrick said.

Mr. Cousins. Is there any impropriety in trying to get down to the bottom of this thing?

Mr. MacGuineas. If you will ask it by proper questions, you may do so as much as you like.

136 Exam. Disque. Is this the man that General Kilpatrick talked about?

Mr. MacGuineas. To my knowledge he is not. I can not read General Kilpatrick's mind; however.

Q. (By Mr. Cousins). Prior to two years ago, Mr. Devereux, what locomotive did you see operating on this properey?

A. The Belt Line Railroad locomotives. I do not know whether the Transport Trading and Terminal operated it. In the days when the Norfolk Tidewater Terminals operated the piers, they had a small locomotive of their own.

Q. Only one?

A. As I recall, only one. I am not certain.

Q. Do you know where the Government got the locomotives it is now operating?

A. No.

Q. You say "no"?

A. No; I do not know.

Q. How long has the Lincoln Tidewater Terminals been operating the United Nations Depot?

A. I can not say definitely, but I think since some time in 1941.

Q. Who operated it prior thereto?

A. Lambert Point Docks, Incorporated, operated it up until such time as the Government took possession.

Q. Do you know why the Government put that company off and put the Lincoln Terminal on as operator?

137 A. I do not know.

Mr. Cousins. That is all.

Q. (By Mr. Reynolds). I understood you to say, Mr. Devereux, that it is your conclusion that 37 per cent of the traffic that moved over the Army Base piers during the year 1943 could have been handled over the Lambert Point and Pinners Point piers; is that correct?

A. That is correct.

Q. What in terms of tonnage was 37 per cent of the traffic that moved over the Army base?

A. For military security, I can not divulge any Army traffic figures.

Q. Can you give us approximately the tonnage?

Mr. MacGuineas. I object to that. We have instructions from the War Department that that may not be revealed.

Mr. Cousins. Do your instructions include the past?

Mr. MacGuineas. 1943. Yes, anything with respect to volume of movement by ships.

Q. (By Mr. Reynolds). How does 37 per cent of the tonnage that moved over the Army Base Piers in 1943 compare with the total export-import tonnage moving through Norfolk during the year 1939?

A. I have not got the 1939 figures.

Q. You have been in the steamship company business for years, you said.

A. Yes, sir.

138 Q. Have you any idea as to how 37 per cent of the traffic moved over Army Base Piers 1 and 2 in 1943 would compare with the total amount of the export and import traffic moving from Norfolk or through Norfolk and Portsmouth during the year 1939?

A. Yes, sir.

Q. Do you not think that 37 per cent of the tonnage moving over Army Base Piers 1 and 2 in 1943 was greater than the total amount of tonnage, export and import, that moved through Norfolk and Portsmouth in 1939?

A. I would not like to risk an assertion on that.

Mr. Reynolds. That is all.

(Witness excused.)

James C. McCready was sworn and testified as follows.

Direct Examination.

Q. (By Mr. MacGuineas). Mr. McCready, will you state your present position?

A. Marine superintendent, Water Division, Transportation Corps, United States Army.

Q. Where are you stationed?

A. The Hampton Roads Port of Embarkation at Norfolk.

Q. Specifically, where do you work?

A. At Piers 1 and 2, Army Base.

Q. What are your duties at those piers?

139 A. Docking and undocking of ships, laying out the cargoes, laying out the ships, getting them to the piers and in the proper berth for movements going out, also providing for movements coming in.

Q. When did you take that job with the Army, Mr. McCready?

A. On July 15, 1942.

Q. Where were you employed before you joined the Army Forces?

A. At the same place, with the Transport Trading and Terminal Company.

Q. That is the terminal operator which operated the terminal before the Army took over?

A. That is correct.

Q. How long did you work at the Army Base Piers for Transport Trading and Terminal?

A. Since July 1, 1940, when I came down here from New York, representing that company. I was superintendent for them up in New York. I came down here as an assistant operating manager.

Q. When Transport Trading and Terminal was operating the Army Base Piers, did that company customarily unload the cars on the pier tracks?

A. They did.

Q. Unload on to the pier floor?

A. That is right.

Q. Who paid the Transport Trading and Terminal Company for that service?

140 A. That is a matter of office record. I understand the railroads paid them. We were the directing agents.

Q. Since the Army took over the base piers in 1942, who has been performing the actual service of unloading the cars on to the pier floor?

A. It is practically the same operation. The only change in it is they turned the Transport Trading and Terminal payroll over to the Army. They just took over.

Q. Is any mechanical equipment being used by the Army in the performance of the unloading service and loading the cars with import traffic?

A. I do not get that quite clearly.

Q. Referring to the unloading of cars for export traffic and the loading of cars with import traffic, is mechanical equipment used in that service?

A. It is, yes, sir.

Q. Will you describe that equipment generally?

A. Previously, before the war, we used to go in mostly with man labor. It was a weak back and a strong mind proposition. We did not have the equipment that we have today and we used to tier the freight naturally man-high all over the pier. Since the war broke out the Army has

come in with a tremendous amount of equipment that has taken its place, but the actual operating and loading and unloading the car is the same. We have the equipment for other things, but you must actually
141 go into the cars and the labor must be performed in the cars in the same manner that it was previously.

Q. It it correct to say, confining yourself to the actual unloading of the car on to the pier floor, that the Army is now doing it the same way that Transport Trading and Terminal did it before?

A. There is a slight change in that due to the mechanical equipment that we have.

Q. But that is the only change?

A. That is right. It is still being hand-trucked out of the car similar to what it was previously.

Mr. MACGUINEAS. That is all.

Cross Examination.

Q. (By Mr. COUSINS). Can the Army unload cars faster than you did?

A. I will say, due to the type of labor you got today, no.

Q. Due to the mechanical equipment that they have today, what is the answer?

A. The mechanical equipment takes its place after the car has been unloaded. It has nothing to do with the physical discharge of the freight from the car there. That is practically the same.

Q. You have not a car unloaded until you have the freight piled up somewhere on the floor.

A. That is true, I agree with you. We have to put
142 it up on pilots, then pile it up later; but to get it out of the car, where we used to take it out of the car and just dump it, now we put it on pilot and tier it up.

Q. That entire operation is the unloading of the car to shipside, is it not?

A. The ship at berth, not always shipside. It is what we call ship's berth on the dock, probably that day, and two days later it may go from shipside into the slip.

Q. The operation of unloading the car has not been accomplished when the goods are piled up, has it?

A. Make yourself a little clearer. I can not get that.

Q. The operation of unloading cars, unloading the freight from the car to pier, in order to accomplish shipside delivery is not completed until the goods are piled up some place, is it?

A. That is quite true.

Q. So the piling up is just as much a part of the operation as throwing the stuff out of the car door?

A. There is a reason for that. We did not go into such volume business before the war. We only had one-tenth of the business then we have now. We can not just pile it manhigh, or overhead. We do not have enough freight vessels to tier it that way. It is necessary to do it as we do now.

Q. You have been on the pier four years about, have you not?

A. Four years on this pier?

143 Q. Yes.

A. I have been on the piers for 36 years.

Q. I thought you said you came to this pier in 1940.

A. I thought you said "piers".

Q. Piers 1 and 2.

A. I have been here for four years.

Q. Approximately two years before the government took over and two years since?

A. That is right.

Q. How has the volume of freight handled now compared with what it was when you were there the first year?

Mr. MacGuineas. I am required to object to that question on the ground of military security.

The Witness. I can not answer that. That would go back to a tonnage statement.

Mr. MacGuineas. A person who knew the past figures would be able to compute the present tonnage.

Mr. Cousins. Did you take these things into account in asking your direct questions?

Mr. MacGuineas. Certainly.

Mr. Cousins. This puts us to a great disadvantage. I do not want to ask any questions that have any bearing on the security of the country, but it puts us to quite a disadvantage when counsel leads these witnesses through all sorts of testimony, then raises these points on cross ex-

144 amination. We should be told in advance what points the witness can not be questioned on.

Mr. MacGuineas. I would like to state on the record that the limitation of military security puts the complainant to just as great disadvantage because we are prevented from bringing out details which we would like to bring out.

Mr. Cousins. Will you ask the witness in my behalf what he can say as to a comparison of traffic today with what it was when he came on the pier, whether he can use the word "substantial"?

Mr. MacGuineas. If you want to ask him whether there is a greater volume today, I will not object to that.

Mr. Cousins. Many times greater.

Mr. MacGuineas. Substantially greater. I do not even know whether we are permitted to say "many times greater."

Exam. Disque. I think we can all assume it is many times greater without the record showing it specifically.

Mr. MacGuineas. Whatever you want to assume you may, but we are under limitations as to what we may put in.

Mr. Cousins. I wanted to ask you whether the operation of unloading the cars and disposing of the freight today is faster than it was when the Transport Trading and Terminal Company was operating there.

The Witness. I would not say the discharge of the cars or the moving of freight was faster. In fact, I think it has slowed up a little bit.

145 Q. (By Mr. Cousins). Why?

A. There seems to be a certain tendency amongst the labor right now. When we get some labor to work for the government they imagine they do not have to move as fast as when they are working commercially. We can not talk with these colored help right now. They want to walk off and they can walk off this Army Base and walk into the next Army Base and get another job. But when we were not doing so much, we could chase them off and they would be glad to come back later.

Q. Are you speaking of the same employees that worked for your former company or of the new class of stevedores today?

A. There are a few of the old ones left. The new ones are coming in every day. It does not make any difference, they all seem to get that one movement and that one attitude.

Q. Do the troops engaged in there work with the same lackadaisical attitude?

A. You have to get officers over them or else they will lay down on the job, too.

Q. When your company was operating the terminal, how many locomotives did you have in service?

A. The Belt Line used to furnish one and two when we were real busy. We had one of our own, which the Maritime Commission had. It was given to us. That is, it was part of the terminal equipment that came over to us to take care of and operate.

Q. What did you use your own locomotive for?

146 A. The same as we would the Belt Line,—switch cars here and there into the pier when we ordered them in.

Q. In your opinion, Mr. McCready, could your company have continued to operate the business up to the present time if the government had not interfered with that possession?

A. I believe they could.

Q. To handle the traffic today?

A. I think the traffic could be handled. The book work could be handled. On the question of labor, without the military personnel to go with it, we could not. If it is tied down to civilian help, I would say, no, they could not handle it.

Mr. COUSINS. That is all.

Q. (By Mr. REYNOLDS). Did you testify as to whether or not the railroads paid the Tidewater Terminal and Transport Company for wharfage and handling?

A. As far as I know they have. We were the acting agents for them. We unloaded the cars, representing them.

Q. You had a contract with them?

A. That is right, we did.

Q. Do you know whether or not the Army has any contract with the railroads?

A. From what I hear, I believe not.

Q. Did the Transport Trading and Terminal Corporation receive any freight consigned to itself which it exported?

147 A. No, sir.

Q. Did it receive from vessels any import freight consigned to itself?

A. No, sir. We operated through the local steamship agencies and shipped out on their instructions.

Q. I did not catch that.

A. We operated through the agent of the steamship, whichever ship was going into a berth, and loaded the cars out under their instructions.

Q. You also operated as agent of the railroads?

A. That is right.

Q. You did not receive consigned through yourself any export or import traffic?

A. That is, through the Transport Trading and Terminal?

Q. Yes.

A. No, sir.

Mr. REYNOLDS. I have nothing further.

Q. (By Mr. WAGNER). Are you certain about that last answer of yours? There was no traffic consigned to your company at the Army Base?

A. Not any export or import freight.

Q. How about tobacco?

A. Tobacco was consigned to us for storage for various accounts.

Q. Was it not consigned to you as consignee?

A. We issued negotiable bills of lading on it.

148 Q. You were the consignee, were you not, of much traffic yourself--

A. No; I would not say we were the consignee. We were the consignee—in other words, I would say we were the consignee for it to be shipped in. We were the custodians of it and issued negotiable receipts in the consignee's name. We would store it for the consignee's account. The consignee did not have an office at the Army Base. We would take that tobacco: It had to be addressed to the Transport Trading and Terminal. It was ordered stored for his account, then ordered out by the consignee for export when the ship arrived.

Q. Was it ever consigned to your company as consignee?

A. I will say yes, consigned to our company as consignee, to be held for the original consignee or owner.

Q. Is it not true that the cost of tiering traffic today at the Army Base is very much in excess of what it was when you were operating for the Transport Company?

A. I think that question came up a minute ago. I could say greater.

Q. In other words, the higher you tier your traffic the greater your cost?

Exam. DISQUE. You mean per 100 pounds or in the aggregate?

The WITNESS. At the present time we have such a short time to work, we have got to build it up in there in order to work it 20 hours a day. We can not work 20 hours a

149 day on it out of the car.

Q. (By Mr. WAGNER). And that increases your cost?

Mr. MACGUINEAS. Just listen to the question and confine yourself to answering the question.

Q. (By Mr. WAGNER). And does that not increase your cost?

A. It does in one way. In another it does not.

Q. You are conserving space, are you not, as you are building your traffic up?

A. Yes, sir.

Q. Does that not increase your labor cost?

A. In one way, yes; in another way, no.

Q. How about no?

A. Because we pilotize it. When we do that we can work shorter gangs, but so far it has not changed our method of unloading cars.

Q. I am not talking about unloading cars. I am talking about tiering your traffic after it gets out of the car. You are conserving space in your tiers?

A. Yes, sir.

Q. Does that not increase your cost, the higher you go the greater your cost?

A. That is true, yes.

Mr. WAGNER. That is all.

Q. (By Mr. REYNOLDS). One or two questions about this traffic that you said was stored at the piers.

150 A. What is that?

Q. I want to ask you a question or two about the traffic you said was stored at the pier.

A. The traffic?

Q. Did you not say in answer to Mr. Wagner that certain of the traffic received at the piers was stored there?

A. Tobacco. He said all traffic.

Q. Tobacco. Was that stored under a tariff provision that permitted tobacco to be stored for a certain length of time?

A. I do not know.

Q. In any event, the Transport Trading and Terminal Corporation did not own that tobacco, did it?

A. No, sir.

Mr. REYNOLDS. That is all.

Mr. COUSINS. That is all.

(Witness excused.)

EDWARD A. DOUGHERTY, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. MACGUINEAS). What is your present occupation, Mr. Dougherty?

A. I am in Freight Operations and Allocation of the Water Division.

Q. Were you formerly employed by the Transport Trading and Terminal Company?

151 A. Yes, for two years.

Q. During what period of time?

A. July, 1940 to July 16, 1942.

Q. Are you familiar with the office records and books of your company in general.

A. Partly.

Q. Are you familiar with the allowances which the Transport Trading and Terminal Company received from the carriers for performance of car unloading and loading at the Army Base Piers Nos. 1 and 2?

A. Yes, based on the tariff.

Q. Can you state in general what the amount of those allowances were?

A. Well, from absorption territory one cent a hundred wharfage and 3 cents a hundred handling.

Q. And that was subject to qualifications in specific instances in the tariff?

A. Yes, sir.

Q. Were you also employed by the Norfolk Tidewater Company?

A. Yes.

Q. What was that company, Mr. Dougherty?

A. Norfolk Tidewater Terminal, Incorporated.

Q. What did they do?

A. They did the same thing as the Norfolk Tidewater Terminal operators.

152 Q. In other words, they were the predecessor terminal operator at Army Base Piers 1 and 2?

A. Yes, sir.

Q. How long did they function at that pier?

A. Fifteen years.

Q. During those fifteen years did the Norfolk Tidewater Company unload the cars on to the pier floor and load the import traffic into the cars?

A. That is correct.

Q. Did they receive the same allowance from the same carriers that Transport Trading and Terminal received?

A. That is correct, based on changes of tariffs and so forth.

Q. Do you know who acted as terminal operator of Army Base Piers 1 and 2 before the Norfolk Tidewater?

A. The Port Commission, City of Norfolk.

Q. Can you state when the Port Commission had it?

A. February, 1920, up until September, 1925.

Q. During that time did the Port Commission perform the loading and unloading services for the carriers?

A. They did.

Q. Did they receive the same allowance from carriers that these other terminal companies later received?

A. Yes, sir.

Q. Did you work for all these companies, beginning with the Port Commission on up?

153 A. Yes, sir, since 1920.

Mr. MacGuineas. That is all.

Cross Examination.

Q. (By Mr. Reynolds). Are you the Government yard master down at the Army Base Piers?

A. No. I did not say I was Government yard master.

Q. I did not catch what you said. I was asking you for information.

Mr. MacGuineas. For the record, are you an office worker?

The Witness. Yes; I am in the office with the Water Division.

Q. (By Mr. Reynolds). What are your duties?

A. In freight operating and allocation, allocating the freight to the piers for the various vessels.

Q. Who gives you your instructions?

A. Who gives me my instructions?

Q. Yes.

A. Newport News, Water Division.

Q. That is a part of the Army?

A. Yes, sir.

Q. Suppose you wanted a car put down on Pier 1 and Pier 2, whom do you call on, the telephone—the railroads or the Army Yard Master?

A. We allocate the freight to the piers and the pier superintendent or the Marine superintendent orders

154 it for his various vessels based on what we have allocated.

Q. Do you allocate by cars or by volume or what?

A. By car numbers.

Q. Do you not have to get the car down there after you allocate it?

A. Yes; that is a pier operation. They get them down there.

Q. Whom do you tell to put the car on the pier?

A. The pier contacts the rail transportation.

Q. Does it not contact the yard master?

A. Through the yard master. He works for the rail transportation and the Navy. In other words, he is yard master of the entire base.

Q. Whom does he get his instructions from?

Mr. MacGuineas. I object to this question. It appears from this man's testimony that his official duties are confined to allocating the traffic, deciding what traffic is to go on to what pier. He has stated he has nothing to do with the actual pier operations or ordering the delivery of cars to the piers.

Mr. Reynolds. If he has nothing to do with it and the record will so show, I will stop right here.

Mr. MacGuineas. Is it not correct, Mr. Dougherty, that it is no part of your job to order the cars on to the pier?

The Witness. That is correct.

Mr. Reynolds. Very well, I have nothing further.

155 Mr. MacGuineas. That is all.

(Witness excused.)

Edward J. Head, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. MacGuineas). State your present position, Mr. Head.

A. I am comptroller of the Port of Embarkation and the chief of the Audit Section.

Q. Chief of what?

A. Chief of the Audit Section.

Q. Will you briefly describe your official duties in that position?

A. I supervise all of the accounting methods and auditing methods in connection with the port. I supervise all of the accounting and auditing operations.

Q. In other words, is it correct to say that generally you are the head accounting officer for the port?

A. That is one of my titles.

Q. Is it part of your official duty to maintain cost records?

A. Yes, sir.

Q. Do you maintain cost records covering the cost to the Army of the loading and unloading services at Army Base Piers 1 and 2?

A. Yes, sir.

Q. Have you prepared a cost study of the cost to

156 the Army of performing those services?

A. Yes, sir.

Mr. MacGuineas. May we have this marked for identification?

(Complainant's Exhibit 6, Witness Head, marked for identification.)

Q. (By Mr. MacGuineas). Was this cost study prepared under your direct supervision?

A. Yes.

Q. Are the figures therein taken from the official records of the War Department?

A. Yes, sir, for piers 1 and 3 at Norfolk Army Base.

Q. What is the cost per hundredweight?

Mr. Cousins. I object to that.

Q. (By Mr. MacGuineas.) Of unloading freight from the car on the pier track on to the floor?

Mr. Cousins. Objected to. I do not think the witness should give a conclusion before he tells us something about this exhibit.

I want to know how the study was made and whether I am going to have an opportunity to cross examine about the amount and character of the traffic that is included in this study.

Mr. MacGuineas. I will state for the record that the study itself relates to the cost of unloading a specific number of tons and pounds also.

Mr. Cousins. I will want to find out how that re-
157 lates to the total and whether—

Mr. MacGuineas. I am sorry, you will not be able to find that out because we are not permitted to divulge that information.

Read my last question to the witness, please.

(The last question was read by the reporter.)

Exam. Disque. Let us change that a little and say, according to the computations you have made in this exhibit.

Mr. MacGuineas. Very well.

The Witness. The direct cost is 4.6 cents per hundred pounds.

Q. (By Mr. MacGuineas). Will you describe what elements of cost you have included in making this cost study?

A. The direct cost of the casual labor in the matter of the actual unloading from the railroad car to the pier platform. By that I mean the actual time spent in the unloading, because we have kept accurate records of only that portion of the work performed from the railroad car to the pier platform and the supervision by the checkers of those casual laborers.

Q. Are those supervisory costs set forth in detail on page 2 of your exhibit?

A. Yes, sir, they are.

Exam. Disque. Would these costs vary with the amount of traffic?

Mr. MacGuineas. Perhaps this explanation will clarify
158 the statement.

Q. (By Mr. MacGuineas). Is it correct, Mr. Head, that this study represents the actual cost figures for a period of 31 consecutive days in 1944?

A. It does.

Exam. Disque. Of all the traffic handled?

The Witness. Of all the traffic handled.

Exam. Disque. If only half of that traffic had been handled in that time, would the cost per hundred pounds be materially different from what is shown?

The Witness. In my opinion, it would not be.

Q. (By Mr. MacGuineas). You say in your opinion it would not be?

A. It would not be, no.

Q. Well, in your opinion, does this cost figure of 4.6 cents per hundred pounds fairly represent the actual cost that the Army has incurred in unloading services since June 15, 1942?

A. I would say yes.

Mr. MacGuineas. That is all on direct examination.

Mr. Donadio. Did I understand you to say this study covered 31 days?

The Witness. Yes, sir. The heading of the exhibit so states.

Exam. Disque. What is the purpose of this evidence?

Mr. MacGuineas. The purpose of this exhibit is to show the actual cost to the Army of performing the serv-
159 ices which we contend either should be actually performed by the carriers or an allowance should be granted to the Army for doing it.

Exam. Disque. Even if you should get a 4 cent allowance you would still be out six-tenths of a cent?

Mr. MacGuineas. That is correct.

Could I clarify that further?

Q. (By Mr. MacGuineas). Is it correct, Mr. Head, that this cost figure as represented in this study does not include in any way the elements of cost that may be involved in wharfage?

A. No. There would not be any cost—this would be purely a direct cost of the unloading of the railroad car by casual labor and the direct supervision of that casual labor.

Q. So that whatever cost the Army may be incurred as owner of the pier or as operator of it—

A. That would not be included.

Q. That is not included in this study?

A. That would be an indirect expense.

Q. One further statement which may clarify the matter. Our complaint asks in the alternative for an allowance of 3 cents per hundred pounds for loading and unloading in addition to the 1 cent per hundredweight wharfage.

This cost study, however, is not concerned with wharfage.

A. That is right.

Cross Examination.

Q. (By Mr. Cousins). What is this first figure of 28,967 tons?

160 A. That is the net tons based on your total pounds in schedule 2; 57,933,810 pounds divided by 2,000 gives you the 28,967 net tons.

Q. Now, tell me, what does it mean? Where did you get the 28,000 tons? Where did you get that figure?

A. I am telling you. 2,000 pounds is a railroad net ton. So you divide that into your pounds.

Q. Where did you get your pounds?

A. Your pounds is in Schedule 2. 57,933,810 actual. I should say Schedule "B".

Q. What I want to know is this: Is the 28,000 ton figure the entire tonnage of freight that was handled over Piers 1 and 2 during the 31 days?

A. Yes. That is, it is the tonnage actually handled by casual labor as unloaded from railroad cars to the pier platform.

Q. That is casual labor?

A. The labor that is used in connection with unloading the cars, the same as they did under the terminal operation.

Q. Was there some more tonnage loaded by some other kind of labor?

A. Not that I know of.

Q. Then you can not say "yes" or "no" as to whether this tonnage was the entire tonnage unloaded from the cars to ship during the 31 days?

161 A. I can say it is the unloading of the railroad cars, from the railroad car to the pier platform, not to the ship.

Mr. MacGuineas. Do you understand that counsel is asking whether this includes tonnage unloaded by Army labor?

The Witness. Does it include—no, this tonnage—are you speaking now principally of what the tonnage is in this study? This is the actual unloading covered by civilian labor.

Q. (By Mr. Cousins). I am asking you a very simple

question. Is this all of the tonnage that was unloaded from the cars during the 31 day period?

A. It is all the tonnage, yes, unloaded to the pier platform.

Q. Where was the rest unloaded to?

A. There is tonnage that is loaded from the railroad cars direct to ship that is not included in there. We do not have any concern over that particular item.

In other words, if you handled a car direct from car to ship you have no problem of unloading to the pier platform.

Q. You are talking about open cars?

A. Generally speaking, about the large stuff they handle by cranes.

Q. Open cars?

A. That is right.

Q. We are not concerned with that in this case.

A. What we have done—let me make it clear to you: We have kept an exact detailed record daily of every
162 car that came in over the pier that was unloaded by civilian labor from the railroad car to the pier platform.

We kept a record of the tonnage, which was verified by the traffic office, the transportation office.

At the same time we kept a detailed time-check record of the actual number of people involved as to man hours, as to the casual labor and the checkers, so you have your direct cost and you have your tonnage as your basis.

Exam. DISQUE. Did any soldiers unload any freight during this 31-day period?

The WITNESS. No soldiers loaded any freight during this particular 31-day period. That is the answer.

Q. (By Mr. COUSINS). Evidently this must not have been one of your busy times?

A. Yes, it was busy.

Q. This was not one of your peak times when you had to resort to troops to unload the cars?

A. This study takes into consideration only the civilian casual labor that unloaded the railroad cars. That is what I am trying to tell you. Whatever few cars might have been unloaded or unloaded by enlisted personnel or direct from car to ship, we did not consider in this particular study.

Q. All I am trying to find out from you is: Was there some of that during the 31 days?

A. Yes, sir, I would say so.

163 Q. I have asked that eight different ways forward and backward. Do you call this 31-day period your representative period?

A. I would say so. The same conditions prevailed over prior periods.

Q. Are you satisfied with the answer you made to the Examiner that your costs would not vary as the amount of tonnage increases or decreases over the pier?

A. I would say that it would not generally vary for this reason, that as our tonnage increases we would have to increase our personnel to handle it.

Q. Was the personnel whose wages you have included in here employed full time in unloading the cars shown on this study?

A. Absolutely.

Q. They did nothing else?

A. They have been employed full time as far back as I know, since the port started.

Q. I want to know whether they spent their entire time during the 31 days in handling this 28,000 tons of traffic?

A. Yes, sir, they did nothing else but that.

Q. How long have you been on these piers?

A. I have been with the Port of Embarkation since September 6, 1942, coming down from the United States Engineers' Office in St. Louis, the United States Government.

Mr. Cousins. That is all.

Exam. Disque. You do not know why it costs you
164 more than private pier operators to do this work?

The Witness. I never went into that. My work consisted entirly of government work.

Q. (By Mr. Reynolds). How much of the total of $25,512.68 representing wages is for overtime?

A. I will have to get my work sheets to get the overtime as computed in connection with this schedule. I did not bring the figures with me. There is overtime computed. There was overtime performed.

The amount of overtime performed depends on the tonnage loaded into the ships, you understand that. The number of gangs working will depend on how much is loaded.

How much the exact overtime is, I can not say right now, but I can refer to my sub-schedule I have in my office.

Q. Can you state approximately how much is overtime?

A. Offhand, no, I can not.

Q. The cost of unloading from railroad cars to piers varies with the kind of traffic handled, does it not?

A. Oh, not to my knowledge, it does not. We handle all kinds of cargoes, for instance, as far as the United States Army freight is concerned. We keep a daily record of the tonnage as to the classification or commodity and the tonnage. We do not classify it.

Q. You have arrived at a figure of so much per hundred pounds. The weight of the traffic would have some-
165 thing to do with it, the weight density of the traffic—

A. You are speaking of the various commodities?

Q. Yes.

A. Yes, I think so, but we make no distinction, because we put the actual weight down on each car.

Q. The weight density of the traffic does have an effect on the cost of unloading, does it not?

A. I do not quite get what you mean. It does not have a bearing in the total overall cost in this respect: when you take a railroad car, you get the actual tonnage, and you get the actual direct expense, and you can then get your ratio.

Q. It costs more to unload a hundred pounds of feathers than it does to unload a hundred pounds of lead, does it not?

A. That is a question I do not think affects us as far as we are concerned, and I refer to Army freight. We do not handle feathers.

Q. You handle freight that varies in weight, do you not?

A. We handle all types of freight. We handle subsistence, trucks, cars, jeeps, everything we handle.

Q. You have reduced your cost to so much per hundred pounds. I am asking you if the weight density of the traffic that you unloaded did not have a material bearing upon the cost per 100 pounds of unloading the freight from the car to the railroad piers?

166 A. As I understand it, you are speaking now that the rate would be different on commodities?

Q. I said weight.

A. The weight is what you are speaking of?

Q. Weight density.

A. The point is, as far as this cost study is concerned, we are talking about total weight regardless of commodity.

Q. I understand what you are talking about, Mr. Witness, but you have here a cost which you say is 4.6 cents per 100 pounds.

A. That is right.

Q. I am asking you if your cost does not vary according to the weight density of the particular traffic that you are unloading from the car to the pier.

A. It would vary in the matter of certain different cars and the commodity unloaded, but we are taking a total 31 day study of all United States Army freight.

We are not classifying that particular freight. We are not classifying it as to commodity.

Q. I understand that. For what period of time was this cost made?

A. I am unable to answer that question.

Mr. MacGuineas. We can not specify the particular dates.

Mr. Reynolds. Then I move that the exhibit be stricken out and all of the witness' testimony in support thereof.

If we can not go into the exhibit to the extent of
167 showing the period covered by the exhibit, I think it should be stricken out because it places us at a serious disadvantage.

Exam. Disque. It is a weakness in their exhibit, but it is due to the necessity for security.

Mr. MacGuineas. Suppose we would assume this covered March of 1944, what effect would that have on your case?

Mr. Reynolds. It might have a very serious effect.

We know what traffic moves over these piers, we know what traffic moved over those piers during the different months, and, as I tried to bring out by the witness, the cost he has here varies with the different traffic handled during any given period.

Exam. Disque. Your objection goes to the weight to be given to the exhibit.

Mr. Reynolds. It goes farther than that, Mr. Examiner.

Of course, if the complainant says that security prevents the information being divulged, I am not going to press it, but still if security does prevent the information being divulged, I do not think they should undertake to prepare a cost study and put it in evidence in this case.

Exam. Disque. Your objection goes to the weight of the evidence.

Mr. Reynolds. No, I think it goes farther than that. It goes to the competency of the exhibit.

We certainly should not have to sit here and ac-
168 cept anything they put in without the right to cross examine.

Exam. Disque. Can Mr. Head say whether or not this is a representative 31 days?

Mr. Reynolds. If he says that, I want the right to go into it.

I certainly do not want to be bound by his statement that it is a representative month.

Mr. MacGuineas. Let me ask him, if I might interject—

Mr. Reynolds. I object to that.

If we are not going to be permitted to determine the period covered by the exhibit, then I object.

Mr. MacGuineas. May I state my question, then make your objection?

Q. (By Mr. MacGuineas). In your opinion, Mr. Head, is the 31 day period which has been selected as the base for this cost study a fairly representative period as to the variety of traffic and costs throughout the entire two year period of Army operations?

A. I would say so.

Mr. Reynolds. I object to that on the ground—

Exam. Disque. If it were not for security considerations, the question would be all right.

Your difficulty is you can not cross examine him without developing some facts that should not be divulged.

Mr. Reynolds. That is it.

169 Exam. Disque. Technically, that would make the evidence inadmissible, I think, but what the Commission may think about that in time of war, I do not know. It does put you at a disadvantage and deprives you of your constitutional rights, technically.

Mr. Reynolds. I agree with the Examiner.

Exam. Disque. But in time of war what the Commission may think of it, I do not know.

Mr. Reynolds. Far be it from me to ask any questions that should not be divulged for security reasons.

I certainly do not think we should be put to disadvantage because of that. I think the complainant here should accept some of the disadvantages and not put it all on us.

Exam. Disque. If we were dealing with some important part of the case, I would be inclined to rule it out without question.

Technically it ought to be ruled out, but this part of the case is unimportant.

Mr. MacGuineas. We are assuming some of the disadvantages because we must now expect that lack of credibility is to be given to this exhibit because we can not disclose the specific dates.

Exam. Disque. They can not answer your testimony.

Mr. MacGuineas. The burden falls on both of us.

May I say for the record that we actually prepared

170 the exhibit giving the specific dates but military in-

intelligence insisted that they be deleted. So the burden falls as much on us as it does on the carriers.

Mr. REYNOLDS. I do not see how you can say that.

Exam. DISQUE. You are trying to take money away from them.

Mr. MACGUINEAS. We are trying to take the money away from them that they have been withholding from us.

Mr. COUSINS. They can not ask any reparation because they would have to show the total amount of tonnage and that is prohibited by military secrecy.

Q. (By Mr. REYNOLDS). I will ask you one other question:

Do you know whether or not any of the traffic, any of the 28,967 tons, moved on shipside rates?

A. I know that all of the freight as recorded during that 31-day period came in by line haul, as far as I know.

Q. Do you know what I mean by shipside rates?

A. No, I do not.

Q. (By Mr. COUSINS). Let me ask you a question, and your counsel can raise the danger signal when we get into trouble.

You have shown here 28,000 tons in a period of 31 days.

A. Yes, sir.

Q. General Kilpatrick told us about the peak periods and how convoys were being loaded. We saw seven ships lying at your pier for loading last night. Yet 28,000 tons in 31 days would not fill the tail end of a convey.

1711 Where is the rest of the traffic?

A. That is what I have explained. I said to you a big part of the traffic that comes in direct from car to ship, we have no—it would have no bearing on this particular study.

We are concerned only with that freight that is unloaded from the railroad to the pier platform at Army Base Piers Nos. 1 and 2.

Q. The great preponderance of freight comes in in open cars, does it not?

A. I could not say that myself personally how it comes in, but there is a good portion of it that is loaded direct from car to ship.

Q. Can not anybody who does not know anything about military affairs look at 28,000 tons and say that that is not going to load many ships?

A. It depends on what the person knows about what the capacity of a ship was. To begin with, that is the net tons.

Your loading tons is in cubic measure. You have two different measures to go by.

Q. What fraction of the freight is this figure of the total amount passed over your pier in the same 31 days?

A. I can not tell you.

Mr. MacGuineas. I object to that.

Q. (By Mr. Cousins). Will you tell us whether it is 2 per cent or 50 per cent, one or the other?

A. I can not tell you unless I look up a complete
172 record which I have not available.

Q. It might be just 2 per cent?

A. I could not tell you that. I could not make an exact statement on that.

Q. What are the hours of your casual labor on the pier?

A. The hours of the casual labor, according to the agreements they operate under, which are the old terminal agreements, is from 8:00 to 5:00 and a half day on Saturday. Anything after that time that they work is generally considered under those labor agreements as overtime or time and a half.

Q. When you are operating around the clock the way the General described, how many hours does a man work who is employed as a casual laborer?

A. On an average, 11 to 12 hours.

Q. All right. If you take page 2 of your exhibit and divide the total hours worked by the number of men there you get 202 hours per man for 31 days.

A. Divide that by 31.

Q. Which is an average of 6 hours per day.

A. That depends upon the way the gangs are worked. The point is it depends on how the ships come in. I do not know that that is right. We have computed—

Q. You have not many days in here of your peak periods when men worked around the clock, have you?

A. Let me explain in answering the question so
173 it will be clear to you. We have had eight casual officers in the matter of checking and loading—that is, the unloading of the railroad cars to the piers for the 31-day period night and day.

We have only got in that record the actual number of hours that were performed in the unloading of those railroad cars to the pier platforms. I can positively state that.

Q. You have told me that the 111 men did nothing else in the 31 days but that particular job.

A. That is true. I can not answer your question because you figure out it is 6 hours. I say on the average, to the best of my knowledge, they averaged about 11 hours a day.

Q. But here they average six hours a day.

A. I have not computed that. Do you want me to compute it? I will tell you.

Q. O. K. I am doing it for you.

A. I would sooner do it myself, then I will know it is right. You are telling me something.

Q. Go ahead and divide it.

A. You have 111 casual laborers working 31 days, is that right? The total number of hours they worked is 2,272; is that correct?

Q. I can read your exhibit. They worked 22,732 and a quarter hours.

A. 22,732 hours, that is right.

Q. All right. Divide one by the other.

A. About 7 hours. 6.7 hours, if you want to be
174 exact. You say 6 hours. There is a big difference between six and six and seven-tenths of an hour.

Q. What is your figure, 6.7?

A. 6.7.

Q. Hours per day.

A. That is right, based on these figures.

Q. How do you explain, then, the fact that you tell me your men worked 11 and 12 hours a day on the average, and it has been testified here that you can not get enough casual labor to do the job properly, yet you say you are only working 6.7 hours per day.

Mr. MacGuineas. Just a minute.

The witness did not testify to that. He said they worked 11 and 12 hours a day on the peak loads or rush loads, which is a different matter.

The Witness. You are taking this actual figure here, which would have to be broken down. The only way I could show it to you would be to actually show you the daily cost sheet. The time and the tonnage is actually on that sheet for each particular man.

Q. (By Mr. Cousins). Did the Army ever employ a stevedore company to come in and perform this work of unloading cars?

A. No, sir, not to my knowledge, as far as I know.

Q. It has always done it with its own employees?

A. It has always done it with the same labor. The
175 stevedore labor is a different operation entirely. The stevedores load from the pier platform to the ship.

Q. I understand that. I want to know why all of these people shown in your study on the Army payroll—or are they on the payroll of some company?

A. They are on the Army payroll.

Q. You have not employed any outside company like Jarka & Company, or the Lincoln Tidewater Terminals, or any other such company to perform this service at the Army base?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. Do you have anything to do with the work over at the United Nations Depot?

A. I have very little to do with the United Nations Depot. I cover Newport News—Newport News and Norfolk terminals from the general accounting standpoint. I very rarely go up to that particular point.

Q. Do you do the accounting for that terminal?

A. The accounting for any particular terminal that would be over in Norfolk would come through the N. A. B. records.

Q. I understand, then, you are familiar with the accounting of the United Nations Depot; is that correct?

A. If it is a part of the N. A. B. Base; yes, I am.

Q. Well, is it?

A. Certainly it is.

176 Q. How much do you pay for the unloading of freight at that base?

A. At what base?

Q. At the pier known as United Nations Depot?

A. How much do we pay?

Q. Yes.

A. Why, I would say it is the same rate of pay as far as laborers are concerned, 64 cents an hour.

Q. You do not hire laborers there, do you?

A. If we have the same conditions there.

Q. Do you have laborers on your payroll that are performing that work on that pier?

A. As far as I know, the only laborers we have are working on Norfolk Army Base 1 and 2, that pier or piers and the United States Army payroll.

Q. Do your records show that you pay the Lincoln Tidewater Terminal Company for doing work at United Nations Depot?

A. To our records show that?

Q. Yes.

A. The Army Base records would show that.

Q. What do you pay that company for unloading cars?

A. I can not answer your question, I do not know.

Q. Why not?

A. Because I do not know the exact figure that they pay. I am not familiar with that contract.

177 Q. Have you not seen the records?

A. No, I have not seen the records.

Q. Is it as much as 92.4 cents per ton?

A. I could not answer that.

Q. What do you have to do with the accounting between the Government and the Lincoln Tidewater Terminal?

A. What do I have to do with that directly?

Q. Yes.

A. I have nothing to do directly with it as far as the contract was entered into by the Army with the company. The payment is made through the funds of the fiscal office.

Q. You do not approve the bills or audit them?

A. I do not pay the bills. They go directly to the fiscal office. I take care of the N. A. B. operation only, 1 and 2, and also Newport News.

Mr. COUSINS. That is all.

Q. (By Mr. WINN). Did you make any cost studies in the same way for other periods?

A. Different periods of time on the same basis?

Q. Yes.

A. No, sir, I did not. This particular study I made over that 31-day period.

Q. So that you do not know from a cost standpoint whether this is a typical period?

A. No.

178 Q. Or a typical cost check?

A. You mean like a spot check?

Q. Something like that.

A. I would say that due to the conditions such as they are at N. A. B. 1 and 2, with the continuation of the handling of cargoes for the various ships, that would be more or less representative for the past periods as well as the period that is covered.

Q. You made no cost studies or checks for any other period?

A. No, I have not.

Mr. WINN. That is all.

Mr. MACGUINEAS. I have a few questions.

Re-direct Examination.

Q. (By Mr. MacGuineas). Mr. Head, is it correct that under your cost study direct labor comprised approximately 92 per cent of the entire cost that you have charged to this operation?

A. I would say yes, that is about right.

Q. Is there any stevedore labor charged in that cost at all?

A. There is no stevedore labor at all. That is only covered by the actual labor paid by the Army for unloading of the car to the pier platform.

Q. Mr. Head, have you made any computations to determine what the actual cost of performing this service would have been if the employees had worked 100 per cent
179 at straight time rates?

A. Yes, sir, I have.

Q. That is to say, if you had eliminated all overtime.

A. Yes, I have done that.

Q. And on that basis, what is the cost per hundredweight to the Army?

A. I will have to get that. On that basis the cost figure is 3.5 cents per hundred.

Q. (By Mr. Reynolds). Why did you tell me you did not know how much of this $25,512.68—

A. I have summary figures here. I can not give you the exact figures you asked for. You asked me how much the percentage was of the overtime. I could not answer that correctly and nobody else could if they did not have their records here.

Mr. Cousins. Will you now turn that also into net tons for our convenience?

The Witness. You mean the last schedule referred to?

Mr. Cousins. Yes.

The Witness. 720.

Q. (By Mr. MacGuineas). Translate 3.6 cents per hundredweight into a cost per ton. What do you get?

A. 69.5 cents per net ton.

Mr. Reynolds. I would like to ask a question.

If the laborers worked from 6 to 7 hours a day, would they get paid for a full day's work?

180 The Witness. They would only get paid for the hours they actually worked.

Mr. Reynolds. Are you certain about that?

The Witness. I know positively that they do not get paid, only for the time worked because the time sheets are cer-

tified to for the actual number of hours expended on United States Army work.

Mr. Reynolds. That is all.

Q. (By Mr. Donahio). Did you say that the per hour rate of pay was 64 cents?

A. For a common laborer.

Q. For casual labor.

A. Yes. The checkers are 95 cents per hour.

Exam. Disque. Why do you call them casual laborers?

The Witness. It is a term we use, a term that they use in connection with a pool of laborers, where they give them certain labor assignments. They get a pool of labor, they give them a job here and there, they assign them, they get them in a pool, and they call them casual labor and then they make these assignments.

Mr. MacGuineas. That is all.

(Witness excused.)

Mr. MacGuineas. Mr. Examiner, I offer in evidence Complainant's Exhibit 6, Mr. Head's cost study.

Exam. Disque. Received subject to objection.

181-182 (Complainant's Exhibit 6, Witness Head, received in evidence.)

Exam. Disque. We will adjourn now until 9:30 tomorrow morning.

(At 5:15 p. m., the hearing adjourned to Wednesday, July 19, 1944, at 9:30 a. m.)

183 Norfolk, Virginia, Wednesday, July 19, 1944.

Hearing resumed at 9:30 a. m.

Before. W. A. Disque, Examiner.

Appearances. As heretofore noted.

Proceedings

Exam. Disque. Proceed, Mr. MacGuineas.

Hays M. Heimbaugh, resumed the stand and testified as follows:

Direct Examination.

Mr. MacGuineas. Will you mark this for identification, Exhibit 7?

(Complainant's Exhibit 7, Witness Heimbaugh, marked for identification.)

Q. (By Mr. MacGuineas). Major Heimbaugh, since June 15, 1942, has the Army paid to the carriers the applicable tariff rates on export and import traffic moving over the

Army Base piers without any deduction or allowance for wharfage or handling?

A. It has.

Q. How have you determined that to be so?

A. I have examined the payments made by the Army on typical shipments which are shown in the exhibit which has just been distributed and which shows the billing reference, including the reference to the freight bills rendered by the carriers and the voucher number, date of payment, and the amount of the payment and the charges for each of these shipments.

184 Mr. MacGuineas. That is all

Exam. Disque. You are asking reparation on all shipments that you have made within two years of the filing of the complaint?

Mr. MacGuineas. Yes, that is correct, since the Army took over the base.

Exam. Disque. Were all shipments received by you shipments on which the government paid the freight charges? Were there any shipments on which the government did not pay the freight charges?

How do we know that on these shipments you paid the freight charges?

The Witness. We paid the freight charges on shipments moving on government bills of lading or on shipments moving on commercial bills of lading converted to government bills of lading.

Exam. Disque. These are the only shipments on which you will ask reparation?

The Witness. We are asking also for reimbursement to the extent that we are bearing the handling and wharfage charges on commercial shipments that moved over the pier for which we have not received reimbursement from the carriers so far.

Exam. Disque. How do we know what shipments they were?

The Witness. Those are matters of record, both in the carriers' files and in our records, which can be deter-

185 mined by a check of the shipments.

Exam. Disque. That could be included in a Rule 100 statement?

The Witness. That could be, yes, sir.

Exam. Disque. Cross examine.

Cross Examination.

Q. (By Mr. Cousins). Major, have you the bills of lading that cover the shipments shown in this exhibit?

A. I do not have the bills of lading. I have the freight bills.

Q. Do the freight bills contain all the marks shown on the bills of lading?

A. The freight bills refer by number to the bills of lading and our examination of the bills of lading show these data relating to export traffic.

Q. Do the freight bills contain this information that you spoke of yesterday which indicates that the shipments were for export?

A. No, as I recall they do not. If they do, it is incidental. I mean, there is no point in showing, for instance, the case number or anything of that sort on a freight bill.

A freight bill is a statement of the charges that the carrier renders to us for the services it performs.

Q. Have you any bills of lading with you?

A. I have the freight bills with me.

Q. You have not anything with you which will enable you to show how these shipments are designated as export shipments?

186 A. I have no freight bills with me covering export shipments.

Mr. MacGuineas. You mean bills of lading?

The Witness. I have no bills of lading with me covering export shipments.

Q. (By Mr. Cousins). Is there any information or that paper which indicates what you had in mind yesterday with regard to the export designation?

A. What is this?

Q. You just look at it. That is a typewritten copy of the material placed on the bill of lading, not containing, however, the printed information.

Mr. MacGuineas. I do not think the witness ought to be asked to comment on what an abstract document, which has not been identified or in any way proven by the carrier, shows.

If you want to produce the bill of lading in full, that is one thing. This is merely some typewritten abstract, apparently.

Mr. Cousins. It is not a typewritten abstract. It is a typewritten copy of what is put on the bill of lading with the typewriter.

I am not going to put it in the record. I am trying to find out what this car is. If the Major can find it, he can tell me. I have no other way of stating to him what it is.

He was talking about it yesterday.

Mr. MacGregor. There is no evidence as to who prepared this, how it was prepared, how complete or incomplete it is.

Exam. Disque. Maybe the Major knows what it is and he can tell us.

Mr. MacGregor. I do not think they are entitled to ask the witness to comment on it.

Exam. Disque. Let us ask the witness to talk on that exhibit.

Tell him what exhibit you want him to talk about.

Mr. Cousins. The witness told us yesterday that some designations are placed on bills of lading which indicate both to the Army people and to the railroad that the shipments are for export. We were not able, to our satisfaction, to elicit from the witness what he meant.

Now I am showing him some papers which contain the kind of information we think we have, and I am wondering if he can find on it what he means.

Exam. Disque. Maybe he could bring a bill of lading at noon and tell us more about it.

The Witness. This says, "for export." This says "for export." Again I do not know what these are. All the information I have is what you have given me.

Q. (By Mr. Cousins). I am not interested in your commenting on these papers. I want to know if you can find on them the designation that you were talking about so I can tell what it is.

Of course, if it is written "for export"—

A. The O. D. T. block permit is shown on each of these.

Q. Is that what you meant yesterday?

I referred to those QMR releases.

Q. Is that all that you meant, that designation up there?

A. That would identify them.

Q. That is not what you refer to as a code number, is it?

A. No. The code number is something else again. You will frequently have the code number in addition. I mentioned there were several ways. For instance, the words "for export" appear on some. The O. D. T. block permit are all necessary and in addition you will have further these code numbers.

Q. Have you checked any shipments that were consigned to the Army Base which subsequently moved out by rail

to some other point and not actually exported from the base here?

A. I did not get the beginning of your question.

Q. I said, have you found any shipments in your study that were brought into the Army base as export shipments but not actually taken out by vessel, as such, but shipped elsewhere by railroad, say to Baltimore, Philadelphia, or some other place?

A. I have not found any, although there may be some. I was not looking for any.

189 Q. How are the railroads to know whether the shipments that come into this port actually go out by boat or whether they were reshipped by rail to some other place?

A. We certify the freight bill that it is exported. We would not put that certification on here unless it has been exported.

Q. You certify on the freight bill?

A. Right. Would it help if I showed you a freight bill?

Q. With that certification on it?

A. Yes.

Q. Well, let us see one.

Mr. MacGuineas. Let the witness make the staement that he is offering these freight bills for counsel's inspection.

The Witness. These are samples of the freight bills I referred to for your inspection.

Q. (By Mr. Cousins). You say, Major, this certification that the freight was exported appears on all of your freight bills when you pay the charges?

A. That is the condition that is referred to in the tariff. We will certify that the shipments have been exported and we do so certify.

Mr. Cousins. That is all.

Q. (By Exam. Disque). You certify when you pay the freight charges?

A. We have a stamp, a certification stamp saying that the shipment was exported. I do not recall the exact 190 wording. That is signed by a transportation officer at the port here.

Q. When is that certificate put on there?

A. It is put on before the freight bill is sent to the Finance office, United States Army, for payment.

Re-direct Examination.

Q. (By Mr. MacGuineas). Will you read the wording of the certificate that is stamped on the freight bills?

A. It reads: "I certify that the contents of this car were

received in good order without exception and that the freight described herein was exported after unloading on April 6, 1944."

The date is filled in.

Exam. DISQUE. Who is "I"?

The WITNESS. That is then signed by M. J. Falsey, Second Lieutenant, Transportation Corps.

Re-cross Examination.

Q. (By Mr. REYNOLDS). Major, do the freight bills covering all of the shipments shown on your Exhibit No. 7 contain the certificate that they were exported?

A. I do not have all the freight bills shown on this statement.

Q. You do not have the freight bills covering all the shipments shown on Exhibit 7?

A. No; we have freight bills to the extent that we could get them.

Q. Will you state whether or not the rates on the shipments shown in Exhibit 7 were shipside rates or not?

A. I did not check the rates.

191 Q. You did not. Do you know whether the traffic contained in the shipments shown on Exhibit 7 came out of storage or moved from storage?

A. The only way I could tell you would be to refer to the freight bills I have to see whether or not they indicated any inbound transit references.

Q. You did not check that?

A. I did not check that.

Q. Were these shipments stored in the base before they were put on the ship, if they were put on the ship? In other words, did the freight move directly from car to ship or did it move from a warehouse in the base to the ship, assuming it was exported?

A. I have not made any inquiry on that point. This is a statement to show that the Army is paying the freight charges on these shipments that moved into the base.

Q. Is your stamp or certificate for export put on the shipment whether it is loaded direct from the car to ship or whether it is moved from warehouse to ship?

A. I did not ask the Lieutenant.

Mr. REYNOLDS. That is all.

Q. (By Mr. DIXON). Are the amounts paid on Exhibit No. 7 supposed to reflect the tariff rates or something else?

A. They reflect the amount actually paid to the carrier by the Finance Office, United States Army.

192 Q. Would that be on the basis of tariff rates, the published tariff rates?

A. Ordinarily it is on the basis of the bills submitted by the carrier.

Q. Look at the second last shipment, spaghetti from Memphis, Tennessee.

A. Yes.

Q. Amount paid $470.27.

A. Yes.

Q. Here is the freight bill covering that shipment. It shows the charges as $513.55.

A. Correct.

Q. Why is there that difference?

A. Why the Finance Officer paid a different amount than shown here I do not know, but the difference does not correspond to the amount of the wharfage and handling. On one of these bills, I do not recall which one, the Finance Officer paid a different amount than shown because of an arithmetical error in the freight bill as it was extended.

Q. I take it that the difference might also be accounted for through the Section 22 quotations or the land grant that were mentioned yesterday?

A. No; those settlements are made by the General Accounting Office in the audit and not the initial payment. If you render a bill based on the Section 22 quotation the

193 chances are that the Finance Office will pay it.

Q. It is based on the tariff rates, and then later on it is cut by the GAO?

A. The Finance Officer pays the bill as rendered, unless there is some obvious error in that bill. He does not audit the bill. If there is an obvious error he does correct that. The audit of the bill is made by the General Accounting Office and that is sometimes as much as two years after the charges are paid.

Q. If these amounts on Exhibit 7 do not reflect the published tariff rates, what conclusion can you draw from the amounts shown?

In other words, what are they?

A. They are the amounts that the carrier asked us to pay for the work they had done. I assume that the carriers are issuing bills based on the tariff rate.

Q. Do you have the carrier's bill covering this shipment from Memphis? Maybe that will tell us the basis for the amount shown.

A. I do not have the tariff here, no.

Q. You do not have the carrier's bill?

A. I have it here. Let me check it. Southern Railway Freight Bill H-20555.

Q. Yes.

A. That is this bill here.

Q. I know it is, but the amount shown on your exhibit is not responsive to the amount shown on the bill.

194

A. That is right.

Q. A moment ago I think you said that the amount shown on Exhibit 7 was the amount covered by the carrier's bills. I just can not reconcile that. I asked you—

A. In general they are, yes. In general they are, but to the extent that the finance officer does not pay the bill as rendered, we have no way of knowing why he has made that deduction.

You will notice that the difference between the amount of the bill and the amount paid is not the same as the difference that would accrue if the wharfage and handling deduction had been made.

Q. The difference seems to be a little greater.

A. It is greater. It does not correspond to the wharfage and handling deduction.

Mr. Dixon. All right. Thank you.

(Witness excused.)

Mr. MacGuineas. We will offer in evidence Exhibit 7.

(Complainant's Exhibit 7, Witness Heinbaugh, received in evidence.)

Mr. MacGuineas. That concludes our *prima facie* case.

Exam. Disque. The defendants may proceed.

S. J. Burrows, was sworn and testified as follows.

Direct Examination.

195

Q. (By Mr. Cousins). Mr. Burrows, are you superintendent of the Norfolk & Portsmouth Belt Line Railroad?

A. I am.

Q. In charge of the operations of that company here?

A. Yes, sir.

Q. That line serves the Army Base, switching in traffic received from the various trunk line railroads at Hampton Roads?

A. Yes, sir.

Q. Are you familiar with the manner in which cars are delivered to the Army Base?

A. Yes, sir.

Q. I ask you to look at Exhibit 2, Mr. Burrows. Near the top of that exhibit I think the Army Base is shown as Piers 12 and 13, is that right?

A. Yes, sir.

Q. Extending back from the piers in the direction which would be east on the map are some tracks labeled "U. S. Army Base Yards."

Upon whose property are those tracks?

A. The Government's.

Q. That is a part of the Army Base, is it?

A. Yes, sir.

Q. And the Government tracks extend, do they, all the way over to the right hand side of the map where they make a connection as shown there with the Virginian Railway?

A. That is correct.

196 Q. How does the Belt Line get to the Army Base?

A. Well, the Belt Line gets to the Army Base from the direction of Berkley Yard, which is our main yard, running over the Virginian Railroad on trackage rights, and coming in at a connection with the Virginian, which is known as Qun Junction.

Q. On the map that is the point at the right hand side where the Army Base tracks connect with the Virginian Railway?

A. That is right.

Q. How far would you say it is from that connection over to Piers 1 and 2?

A. From the Virginian connection to the piers—this would be my guess—I would say it is about 2¼ miles from the Virginian connection to the piers. That would be my guess.

Q. Now, running north and south on the map, there is a highway, is there not?

A. Yes, sir, known as Hampton Boulevard.

Q. Now, what is the purpose of the yard track to the east of that boulevard?

A. The Government uses that for classification and storage of cars when they are not ready for them down on their piers and warehouses, as I understand it.

Mr. MacGuineas. Now, Mr. Examiner, the witness is now testifying to something of which he understands. In other words, he does not have knowledge of it. He does not function at this yard. He does not have to know what the

197 government does.

The Witness. Well, I do know what they use it for.

Mr. MacGuineas. Are you down there at the yards?

The Witness. I am pretty familiar with it.

Mr. MacGuineas. Are you down there?

The Witness. I can stand a test on anything you want to ask me about it.

Mr. MacGuineas. Are you stationed in the yards?

The Witness. I am not stationed in that location, no, sir, not anymore than I am stationed at any other point on the Belt Line.

Mr. MacGuineas. I object to further testimony by this witness as to what the government actually does in those yards since it does not appear he has personal knowledge of it.

Exam. Disque. Do you have personal knowledge?

The Witness. I stand by the statement I made as to what they use the yard for.

Exam. Disque. How do you know that?

The Witness. I have been down there on several occasions. I have contact with our crews that go in there and I have contact with the yard people at the Army Base and I know that that is what they use the yard for from conversations I have had with them.

Exam. Disque. Is it part of your business to know that?

The Witness. It is not exactly part of my business, no, sir, but from dealing with them, why, I understand
198 that is what it is used for.

Mr. MacGuineas. The witness himself states very plainly it is not his official position to know it; secondly, it is hearsay because he gets it by conversation with other people.

Exam. Disque. Do you think it is true what he is saying?

Mr. MacGuineas. I do not know. I will be glad to have a qualified witness establish the fact.

Mr. Cousins. I am not going any further with that line. I do not think it is of any consequence.

Q. (By Mr. Cousins). What is the nature of the tracks just west of the boulevard? You do not need to say what the government does with them, but describe them, as you would as a railroad man.

A. From what I know about them?

Q. Yes.

A. The tracks between the piers at Hampton Boulevard are known as Pier 1 coal yard for advance freight.

Mr. MacGuineas. Mr. Examiner, I object to testimony by this witness as to what is actually done on those tracks. He is not qualified on that subject.

Mr. Cousins. We will turn to a different subject and I will ask him only what his railroad does with respect to those tracks.

Q. (By Mr. Cousins). Mr. Burrows, when the Belt Line has a string of cars consigned to the Army Base, tell
199 us how they are handled, how you make delivery, what you do with them?

A. We make what is known as a Qm classification. Qm is a designation that we use for the Army Base. We make that classification in Berkley Yard for roads connecting in the vicinity of Berkley and Port Norfolk, which is the Norfolk-Western, Norfolk-Southern, Seaboard Air Line, Atlantic Coast Line, and the Southern Railroad. The cars consigned to Qm or the Army Base are moved to Berkley and the Qm classification made. The trains are moved in either solid trains or solid cuts on Sewalls Point trains over the Virginian Railroad to Qm Junction, moved in via Qm to where it shows on the map as U. S. Army Base yards located between Hampton Boulevard and the Virginian.

Before leaving Berkley we get disposition of those trains from the yard office in the Army Base. They tell us what disposition to make of the trains and, as a rule, they are put on one of the three running tracks between the yard and the Virginian connection. Those running tracks are known as the new track, the new running track, and the old main line.

Q. Those are the tracks in the Army Base yard?

A. They are in the Army base yard and they are known as the running track between the Virginian Railroad and the entrance to their first yard. They have a yard on both sides of these main tracks. One side is known as the old
200 yard, which is to the left going in, and the new yard to the right going in.

Q. I understand you to say that your railroad gets instructions from the Army Base yard office as to when to bring the cars in there and where to place them?

A. Where to leave them, yes, sir.

Q. Where is it that you are told to leave them?

A. Well, whatever track they want them left on. It may be the new track, it may be any one of the three running tracks, as I just named, or it could be on any of the tracks in either the old yard or new yard.

We have had to put the trains on as many as five tracks in either one of those yards. Those tracks will hold—I do

not think there is any of them that will hold over about 18 cars.

After they built this new track, which is the third track up here, why, the big majority of the time we will have them on one of those running tracks which they so designate.

Q. Who is it in this yard office that gives you your instructions?

A. In daylight?

Q. Not by name.

A. It is the lead man or his assistants. His assistants are known as yardmasters. I believe that is their title.

Q. Are they Army Base men or railroad men?

A. They are Army Base men.

Q. Now, after you have run your train into the
201 Army Base yard, what happens from that point on?

A. In respect to the crew or the cars?

Q. Both.

A. Well, the crew is brought out of there light, back to Berkley, or wherever we might want to send them.

Q. That is all that crew does?

A. Well, he drops them off there.

Q. Then what happens?

A. The cars then are disposed of by the Army people, under Army supervision.

Q. Is the Belt Line not instructed to bring cars through from your Berkley yard for delivery direct to Piers 1 and 2?

A. No. We have not had any instructions to deliver cars direct to the piers from Berkley Yard.

Q. The cars are placed on the piers at some time subsequent to the time when your engine leaves them in the yard?

A. That is right. We are talking about through Qm Junction now?

Q. Yes. We will take up the other in a moment. What power takes the cars from the yard down to the piers or warehouses?

A. We have two crews working in the Army Base. They vary from 7 to 9. These crews are worked in a pool and the work is assigned to them by the Army Base, under their supervision.

Q. Do you mean by that that the cars are not moved to the piers under any instructions from you or your force?

202 A. That is correct.

Q. Wholly under the instructions of the Army Base employees?

A. That is correct. We stop at Qm and at Qm Junction, as far as the supervision goes, and the north gate from the other entrance to the Army Base."

Q. I think you wanted to go ahead and explain about the north gate entrance.

A. Do you want that explained now?

Q. Yes.

A. We have another connection with the Army Base known as the "north gate" which, according to this map, enters there where it says "Norfolk Portsmouth Belt Line Railroad."

Mr. MacGuineas. Where it crosses Hampton Boulevard; is that correct?

The Witness. Yes. The connection is right around to the west of there.

Mr. Cousins. Yes. All right.

The Witness. We also put cars for the Army base in through that connection. We receive those cars from the C & O Railroad and some from the Pennsylvania.

The method of operation there is that our two crews that work in the Base are on duty at this Sewalls Point engine house, which is located right along that line where it says "Norfolk and Portsmouth Belt Line Railroad." They go on duty at 8:00 a. m. and 4:00 p. m. Those crews
203 take what cars we have for the Army Base in with them when they go on duty. That is around between 8:00 and 8:30 a. m. They clean up what Qm cars we have in the Sewalls Point district, and then again between 4:00 and 5:00 p. m.

Cars that accumulate between those hours and after 5:00 p. m., we push them in through the north gate to a track known as the "chain gate." There are two tracks after you get in the north gate, two leads around towards the piers. We put our cars for Qm in that gate and the Army takes them over from there.

Q. Can you tell us where that track is on the map?

A. I believe it is this track here (indicating). You see, this is the end of Piers 1 and 2. Just after you clear the—you see the boundary-mark is not on this thing here. It is just after you get in government property.

Q. It is the track west of the Boulevard, which is a track north of the warehouses shown on this map?

A. The leads to the warehouses and in that location lead on or take off from one of these tracks that parallels from the north gate going in. It leads to the warehouses and

connects up with one of the tracks. Then there is another track beside that which parallels it. They put their empty cars coming to the Belt on this lead that connects up with the different warehouse. That is what they call the new track. We call it the new track. That is where all
204 the empties are put out. The crews in the base back the empties out there and we reach in there and get them, just a short distance. The track that parallels that is known as the chain gate track. That is the track that we put our loads on going into the Base, through the north gate.

Q. That is on Army Base property?

A. Yes, sir, from the gate.

Q. And the Army Base takes care of the cars from that point?

A. That is correct.

Q. Where is the bulk of your deliveries made, through the Qm Junction or through this north gate?

A. Through Qm Junction inbound. Of course, the outbound empties are all brought out via the north gate, but the inbound movement, the bulk is through Qm Junction, and all empties out via the north gate.

Q. Mr. Burrows, are you familiar with the number of cars that are delivered to the Army Base currently, say for the last six months? I mean in a general way, not specifically.

A. I am familiar with the—the exact figures, you may say, or approximate figures for the month of June.

Mr. MacGuineas. We do not wish to prevent him making a general statement but if we can, we would rather not have him give, say, 200 cars in the month of June. We do not want the statement to be that specific for security reasons. Can he not indicate generally in hundreds or thous-
205 ands of cars over six months or something like that?

Mr. Cousins. I want to ask him about the month of June.

Q. (By Mr. Cousins). You have made a check for the month of June?

A. Yes, I have checked for all the months.

Q. Do not answer my question until Mr. MacGuineas has a chance to interrupt if he wants to.

Mr. Burrows, during this past month of June, were the number of cars delivered to the Army Base in the hundreds or in the thousands?

A. It will be in the thousands.

Mr. MacGuineas. That is, June 1944.

Mr. Cousins. June, 1944.

The Witness. Yes, sir.

Q. (By Mr. Cousins). In the thousands of cars?

A. In the thousands.

Mr. Cousins. Mr. Examiner, the witness is prepared to say how many thousands, if you desire a specific figure rather than leaving it in a somewhat vague manner.

Mr. MacGuineas. I think for security reasons it is better to be left this way.

Q. (By Mr. Cousins). Mr. Burrows, would you say that a total of 28,000 tons of traffic in a period of 31 days was at all representative of the month's export business during the past half year or year?

Exam. Disque. State what kind of export business.

206 Mr. Cousins. Over the Army Base.

Exam. Disque. In box cars, you mean?

Mr. Cousins. I mean all export traffic that moved over the Army Base.

The Witness. What was the total?

Q. (By Mr. Cousins). 28,000 tons in a period of 31 days.

A. Over that? Would it be over that?

Q. Would you call such traffic as that representative at all of a month's business on that pier?

A. It would be much over that I would say.

Q. If you took 28 tons as an average load, that would give you a thousand cars, would it not?

A. That is right.

Q. Would your average load be as low as 28 tons?

A. I would say that the average tons per car would run better than 28.

Q. How much more?

Q. I would say they would run—35 tons would be my guess.

Mr. Cousins. That is all.

Cross Examination.

Q. (By Mr. MacGuineas). Mr. Burrows, how long have you been connected with the Belt Line?

A. January 15, 1942.

Q. Where were you before that time?

207 A. Thirty-three years with the Pennsylvania Railroad at Philadelphia.

Q. So you know nothing about the actual operations at the Army Base prior to 1942 of your own knowledge?

A. No, sir.

Q. But you do know the operations as they were conducted between January and June of 1942, is that so?

A. Well, not too familiar with the operations between January and June for several reasons. I can give you them if you want them.

Q. Did you have a different job with the Belt Line?

A. I did not have a different job with the Belt Line, but in January—I came down here in January, 1942, a new man on the property with the exception of two months investigating conditions on the Belt Line during August and September of 1941.

Q. Pardon me. You say you were here in August and September, 1941?

A. On special duty.

Q. Investigating conditions?

A. Yes, sir.

Q. Actual operating conditions. Did that include operating conditions at the Army Base?

A. No.

Q. You did not see those at that time?

A. No; just a general check up. That is what it was. As you know, the war had just got under way and the
208 conditions on the Belt Line were very crowded. I did not have too much time to analyze the work being performed in the Army Base territory as those crews worked in there. The work was assigned by the people in charge of that territory the same as it is now.

In other words, our crews went in there and they worked under the supervision of the people at the Base and it did not take a whole lot of checking.

Q. At that time who was operating the Army Base, when you first came down here in January, 1942?

A. The Transport Trading Company.

Q. Transport Trading and Terminal?

A. Yes, sir.

Q. And the Army then owned all of this area which you described as they now own?

A. I do not know.

Q. How do you know they own it now?

A. Only from hearsay. I have never seen anything on paper.

Q. You really do not know now who owns all of that trackage that you spoke about?

A. Only from hearsay.

Mr. Cousins. I do not think I really asked about ownership. When I said Army Base property I just meant under

whose control it was. I did not intend to ask him anything about that.

Mr. MacGuineas. He said it was Army tracks.

209 The Witness. That is right. It is Army tracks.

Q. (By Mr. MacGuineas). The tracks were the same in the first half of 1942 as they are today, were they not?

A. No, sir.

Q. Substantially. You had your assembling tracks back of the warehouses, did you not?

A. On the west side of Hampton Boulevard, I will say that they were, with maybe some minor changes; but on the east side of the Boulevard there has been a lot of new work up in there.

Q. In the first half of 1942 there were some interchange tracks to the east of Hampton Boulevard, were there not?

A. Yes, sir, the old yard.

Q. What is it?

A. Yes, the tracks in the old yard were there, but the physical connection at Qm was not. We were not operating through Qm then. Everything was going around north gate.

Q. You say you have a Belt Line engine in the Army Base on the Army Base tracks today?

A. Two.

Q. Two Belt Line engines?

A. Yes, sir.

Q. You run those two shifts?

A. 8:00 to 4:00 and 4:00 to midnight.

Q. With Belt Line crews?

A. That is right.

210 Q. And the Belt Line assumes the full expense of those engines and crews, is that correct?

A. That is right.

Q. You also had those in there in the first half of 1942, did you not?

A. That is right.

Q. Those two Belt Line engines pick up cars which your main line engine drops off at the yard and carries those cars on to the Army Base pier tracks, does it not?

A. Yes, sir.

Q. And that was also done by the Belt Line in the first half of 1942, was it not?

A. Yes, sir.

Q. In the first half of 1942, did the Belt Line also assume the expense of the engines and the crews for those two engines in the yard?

A. Yes, sir, as far as I know.

Q. With reference to the total tonnage which you move into the Base in any given month, there is a substantial fluctuation in the different months, is there not?

A. Well, it will not run true to form. It will fluctuate, yes, sir.

Q. In a six months' period, the high month might be twice as much as the low month, might it not?

A. Yes, sir.

211 Q. Do you think the high month might be three times as high as the low month?

A. Well, that all depends on the number of ships that they allocate to the piers. When there are no ships, why, they just do not move the cars in. That is, they take the cars in until it hurts, then they hold them out.

Q. So you think there might be a low month in 1944 when there were relatively few ships to load so that the tonnage that you pulled into the base would be only one-third of what you might have pulled in in your highest month?

A. Could be, yes, sir.

Mr. MacGuineas. That is all.

Re-direct Examination.

Q. (By Mr. Cousins). When you said that you had two engine crews operating on the Base, did you mean at one time or during the 24-hour period?

A. I meant during the 24-hour period; one engine, two crews. In other words, we man an engine in there from 8:00 a. m. to midnight, one crew working 8:00 to 4:00. That engine comes out at 4:00 o'clock and is prepared for the crew coming on duty at 4:00 o'clock to work to midnight.

Q. Along with that you did state before that the Army Base does keep 7 to 9 crews working?

A. Yes, sir.

Q. How many locomotives do they have?

A. I do not know that I can give you that. I could

212 give you my guess. I can do that, but I do not know actually.

Mr. Cousins. That is all.

(Witness excused.)

E. A. Hookinson, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. Cousins). What is your occupation?

A. I am a member of the Auxiliary Committee of the Trunk Line Association.

Q. That is an association of railroads in Trunk Line Territory?

A. Yes, sir.

Q. Including many of the defendants in this case?

A. Yes, sir.

Q. What is the nature of your work with that organization?

A. Since my connection with the organization, dating back to January 15, 1928, I have been engaged exclusively almost in connection with Interstate Commerce Commission work.

Q. You mean by that you are familiar with rates and tariffs and that sort of thing?

A. Yes. I have had over 30 years of experience along those lines.

Q. Mr. Hodkinson, will you please explain briefly the manner in which the port rates to and from North Atlantic ports have been made, indicating the extent to which the level of the rates has been influenced by the so-
213 called port practices such as loading and unloading cars?

A. More than 50 years ago the railroads found that it was not practicable to permit the public to come on the railroad piers to load and unload cars and that it was essential for the railroads to exercise control over water-borne freight handled from railroad piers to the end that the work involved might be performed without shippers' interference and for the railroads' convenience.

Consequently, at the various North Atlantic ports from Portland, Maine, to Norfolk, Virginia, the railroads undertake within certain defined limits to load from pier to car or unload from car to pier, water-borne freight which is also accorded the rail movement.

The practice is definitely limited by tariff provisions, which will be referred to later in my testimony, but in the main, this practice is a privilege restricted to railroad piers, and it originated in connection with the operation of railroad piers.

The omission of a specific charge for this service goes so far back in history that a complete explanation can not be made. However, we do know that it resulted partly from competition with the railroads' earliest competitor—the Boat Lines, which necessarily handled freight between vessel and pier, where it became available to the consignees to cart away by their own vehicles.

214 Thus it came about that the freight rates to and from the ports, included the loading and unloading of water-borne freight to the extent of the tariff limitations, but nevertheless, the level of the port rates has never been fixed with this practice in mind. In other words, the reasonableness of the port rates—by which I mean the rates applicable to export, import, intercoastal and coastwise traffic—does not depend upon the existence of the free-loading privilege. This conclusion is supported by various reasons:

Prior to 1932, under the old Port Differential Adjustment, which is well known, port rates were based upon the rates to and from New York, that is to say, the rates to and from New York were basic rates and rates from Central Territory to Philadelphia and Baltimore were uniformly on all classes 2 and 3 cents, respectively, lower than to New York. Westbound the same differential applied, except that on first and second class they were 6 cents at Philadelphia and 8 cents at Baltimore. The domestic rates, generally, were the same as the port rates.

Boston maintained competition with New York by the establishment generally of the same rates and the Hampton Roads Lines granted Norfolk the Baltimore basis or lower. This adjustment had been maintained for a long time without regard to different practices at the several ports with respect to certain privileges accorded water-borne

215 freight, such as storage, wharfage, and handling. Some of these privileges were accorded at some ports and not at others and to the extent accorded, the privileges differed at the different ports. This was brought about partly from the fact that these privileges are local in character and are published in the port tariffs of the railroads serving the port, but they are neither published nor participated in by other railroads that participate in the transportation. For example, the free loading service at Norfolk, which is involved in this proceeding, is a privilege published only in the tariffs issued by the Norfolk Lines and any expense incurred is not participated in by the line-haul connections of the carriers serving Norfolk.

At New York the principal port privilege is free lighterage, but if free lighterage was abolished and a special charge provided for that service, it is not thinkable that the New York port rates would be correspondingly reduced. Such a reduction would result in rates to New York lower than to any other North Atlantic port and would upset the

entire port relationship. This illustrates the point that although the basic New York port rates include lighterage, nevertheless, the level of the rates did not reflect the additional service performed in that port.

Another illustration is found in the absorption of wharfage at Norfolk. No similar payment to pier operators has been made at New York, Philadelphia, and Balti-
216 more. This difference in practice has had no effect upon the rate level.

I have just dealt with the rate situation prior to 1932. In that year, as a result of the Eastern Class Rate case, Docket No. 15879, in which the Commission prescribed domestic rates on a distance basis, the long established port differential relationships were destroyed on domestic traffic. In order to preserve the differential relationships on import and export traffic, it became necessary to change the port rates because they were higher to a large extent than the domestic rates prescribed in the Eastern Class Rate case.

This change was made by using the prescribed Baltimore domestic rates as a standard. With some few exceptions the Baltimore port rates became the same as the domestic rates and as previously stated, the port differentials were applied to the Baltimore rates, Philadelphia 1 cent over Baltimore, New York 3 cents, and as in the past the Norfolk Lines maintained the Baltimore basis despite a sharp difference in the domestic rates. Just as the New York port rates which formed the basis for the old adjustment were made largely on the factor of distance, so the present Baltimore port rates which now provide the basis for the whole adjustment, are governed largely by the same mileage standard as the domestic rates.

Thus the level of the Baltimore port rates was not influenced by the local port practices at Baltimore and the
217 port relationships are maintained as always without regard to the several ports.

Q. Can you give any other illustrations which support your conclusion that the rate level has not been influenced by the port privileges?

A. As already mentioned, there are numerous other considerations which indicate that the level of the rates does not depend upon the existence or non-existence of certain port practices.

I have already referred to free lighterage at New York and to the wharfage absorption at Norfolk, neither of which

had any effect upon the rates, and to the rates to Baltimore which are largely upon exactly the same level as the domestic rates in connection with which loading or unloading does not generally come into play.

In further connection with this phase of the question, a large portion of the traffic moving on port rates is in open top cars which are not loaded or unloaded by the railroads and yet are subject to the same port rates.

The tariffs exclude from the loading privilege certain commodities, such as heavy and bulky articles, and lumber, and yet it has never been suggested that line haul rates should be reduced on these commodities for that reason.

There is a considerable quantity of port traffic which moves over private piers or over other facilities where the port privileges do not apply.

218 During the greater part of the history of the Port of Newark no special privileges were accorded by the local railroads, but Newark has always had the same port rates as New York.

Another illustration that the port privileges have not been governed by the level of the rates is provided by the fact that the class rates between the port cities and a large part of Eastern Trunk Line territory applicable on export and import traffic are generally the same as applicable on domestic traffic between the same points.

I might refer to the rates from Scranton, Pennsylvania, Rome, New York, and to the territory generally east of Williamsport, Pennsylvania, Altoona, Pennsylvania, and Cumberland, Maryland.

Q. Now, I think you have prepared an exhibit dealing with the reasonableness of the Norfolk rates.

A. The Norfolk port rates as a result of the application of the Baltimore basis are depressed well below any standard of maximum reasonableness. The best test is comparison with domestic rates.

In my Exhibit 8, which consists of seven pages, I have shown the class rates, domestic, export, import, intercoastal and coastwise between 100 base points in Central Freight Association territory and the Ports of New York, Philadelphia, Baltimore, Albany, Norfolk and Boston,
219 with the short mileage between each point.

This confirms my previous statement that Baltimore constitutes the basic rate under the present adjustment and that the Baltimore port rates are practically the same as the domestic rates.

Particular attention is directed to the summaries on page 7 of the Exhibit. In this summary, I have shown the average miles between the 106 base points and each port; the average domestic rates; the average import, intercoastal and coastwise rates; the average export intercoastal and coastwise rates and the percentages which the import rates and the export rates represent of the domestic rates as to the individual classes and also for the average of the six classes.

Norfolk, Virginia, has an average distance of 838.3 miles as contrasted with Baltimore 690.1; Philadelphia 745.7 and New York 804. It has a higher average domestic rate than any of these ports, but a lower average import and export rate. While at Baltimore the average of the six classes import rates represents 99.2 per cent of the domestic rates, and the average of the six classes of export rates represents 99.5 per cent of the domestic rates, the average of the six classes of import rates from Norfolk is only 90.5 per cent of the domestic rates and the average of the six classes export rates is only 90.9 per cent of the domestic rates.

My next Exhibit 9 is a statement showing examples
220 of the class rates between representative points in Central Territory and the North Atlantic Ports in effect prior to the rates published in I.C.C. Docket 15879, Eastern Class Rate Case. These rates applied to all classes of traffic, domestic, export, and import.

As previously stated at this time, the New York rate was the basic rate and the rates to and from the other ports were differentially related thereto.

The relationships between the ports is a sensitive adjustment and has been under consideration by the Commission on numerous occasions.

For convenience, I have in my next Exhibit 10 given reference to the various cases in which the Interstate Commerce Commission has considered the differential relationship of the rates on export and import traffic to and from North Atlantic ports.

In my next Exhibit 11, consisting of 6 pages, for convenience I have reproduced Appendix B to I.C.C. report in I.C.C. Docket No. 13548, Maritime Association, Boston Chamber of Commerce, 95 I. C. C. 583. The last two paragraphs on Page 4 and the balance of the exhibit outlines the history of these differentials subsequent to the Boston case and brings the history up to date.

Q. Have you an exhibit which shows in a general way the rules governing the application of export, import,

221 intercoastal, and coastwise rates at the North Atlantic ports?

A. Yes. I have such an exhibit consisting of 2 pages, which is offered for identification as Exhibit No. 12. While the exhibit speaks for itself, I would like to draw attention to the provisions that the export rates are applicable, except as otherwise provided, only on traffic which does not leave the possession of the carriers and which is delivered by the carriers direct to the steamer or steamer's dock. Also to the provision that export rates will apply on shipments consigned on bills of lading for export handled through United States Navy Yards, Naval Bases, or Army Bases when proper evidence of exportation is given.

Q. Have you prepared an exhibit or series of exhibits which show the privileges accorded by the carriers at the several North Atlantic ports with respect to water-borne freight?

A. Yes, I have several exhibits covering the ports of Norfolk, Virginia, on the south, to Port Newark, New Jersey, on the north.

Before introducing these exhibits it should be stated that the official territory lines reach the terminals at Norfolk and Portsmouth over which water-borne traffic is transshipped to and from vessels through the facilities of the Norfolk & Portsmouth Belt Line.

The latter's tariff contains rules and regulations governing wharfage and handling and, as to the Official

222 Territory Lines, the tariff, Agent Cunningham's I. C. C. 105, in Section 3, Item 910, on page 34 provides for a wharfage charge of 1 cent per hundred pounds and a handling charge of 3 cents per hundred pounds, except on specific articles not entirely pertinent here. The Trunk Lines in turn provide for the absorption of said wharfage and handling charges.

Exhibit No. 13, covering Norfolk, Virginia, shows Official Territory Lines shown in the heading thereof absorb wharfage charge not to exceed 1 cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds, as indicated in connection with the subject matter under the names of the various terminals listed in the exhibit.

Exceptions to the foregoing are shown in the three paragraphs in the lower right-hand corner of page 2 of the exhibit, one of them being that the absorption will not be made on freight in open cars, except on lumber.

The exhibit further shows that the absorptions are made only when the freight rate is not less than 10 cents per 100 pounds, or $2.00 per ton.

Exhibit No. 14 covers Baltimore, Maryland, and, briefly stated, shows when the freight rate to or from Baltimore is not less than 10 cents per 100 pounds, or $2.00 per ton, the freight rate will include loading from lighters to platform of piers under cover or unloading from cars to platform of piers under cover. Certain exceptions are
223 shown in the exhibit, among which is that loading and unloading is not performed on traffic handled from and to open cars at open piers. The service of loading and unloading at Baltimore is performed only at railroad piers.

Exhibit No. 15, covering Philadelphia-Camden, is similar to the preceding exhibit and shows that traffic loaded in open cars will not be loaded or unloaded at carriers' expense at uncovered piers. At Camden the service is performed only at the Camden Marine Terminal operated by the City of Camden. At Philadelphia the service is performed at carriers' piers or at public piers operated by steamship companies, pier companies, City of Philadelphia, or by individuals excepting the piers controlled by the owners of the traffic.

Exhibit No. 16 relates to Wilmington, Delaware, where the service is performed only at the piers of the Wilmington Marine Terminal operated by the City of Wilmington.

Exhibit No. 17 relates to Chester, Pennsylvania, where the service is performed only on traffic handled over carriers' piers, or piers of the South Chester Terminal and Warehouse Company.

Exhibit No. 18 relates to Trenton, New Jersey, where the service is performed only at the piers of the Trenton Marine Terminal operated by the City of Trenton.

Exhibit No. 19 is W. S. Curlett's Tariff I. C. C. 733, which covers the service of the Port of Newark. It will be noted that the service is performed only on traffic handled
224 through the piers, terminals, and bulkheads, both owned and operated by the City of Newark, New Jersey, and operated by the rail carriers. The service is not performed on numerous commodities as specifically shown in the rule, and that is on pages 6 and 7 of the tariff exhibit.

Exhibit No. 20 is a reproduction of the consolidated freight classification No. 16, Rule No. 27, which relates to loading and unloading of carload freight. This exhibit is self-explanatory.

Mr. Cousins. Cross examine.

Mr. CHAFFEE. Before we get into cross examination, I do not know whether you so stated or not, but are you testifying on behalf of the Pocahontas Lines as well as the other trunk lines?

The WITNESS. I am appearing here as Mr. Cousins' witness.

Mr. COUSINS. Mr. Hodkinson is not called on behalf of any other railroad.

Mr. CHAFFEE. He is on the stand on behalf of certain carriers?

Mr. COUSINS. He is called to the witness stand by me with reference to the Pennsylvania Railroad.

Mr. CHAFFEE. Is he purporting to speak on behalf of the Pocahontas carriers?

Exam. DISQUE. Anybody can use his testimony.

Mr. COUSINS. He is not prepared to speak on be-
225 half of the Pocahontas carriers or any other carriers.

Mr. CHAFFEE. All right.

Mr. COUSINS. He is called as my witness.

Q. (By Mr. CHAFFEE). On your Exhibit No. 13, did you there indicate that the Chesapeake and Ohio Railroad, which you show as one of the official territory railroads serving the Port of Norfolk, does not absorb the wharfage and handling charges on export and import traffic items on the several pages of that exhibit?

A. My understanding is that the Chesapeake and Ohio did not absorb any incidental charges incurred in connection with export or import traffic through the Port of Norfolk.

Q. When that carrier is the delivering carrier?

A. Yes, sir.

Q. So that as a practical matter the Chesapeake & Ohio should have been eliminated from your Exhibit No. 13?

A. If it does not show the exception on the part of the C & O, it should be eliminated.

Mr. CHAFFEE. I can not find the exceptions in that exhibit.

Mr. COUSINS. I think maybe it should.

The WITNESS. Should be eliminated.

Mr. COUSINS. From this exhibit.

Mr. CHAFFEE. It is all right to name the Chesapeake &
Ohio as an official territory carrier serving the Port
226 of Norfolk as you do in the heading, provided there is some indication on the exhibit that these various absorptions named in the several items do not apply for account of that carrier.

The WITNESS. In the absence of the limitation as far as the C & O is concerned, I agree that the C & O should be eliminated from the heading of the exhibit.

Mr. CHAFFEE. That is all. Thank you.

Mr. MACGUINEAS. Are the carriers through cross-examining their witness?

Exam. DISQUE. Yes. You may proceed.

Cross Examination.

Q. (By Mr. MACGUINEAS). Mr. Hodkinson, you stated that in general these unloading privileges, as you term them, are accorded only at railroad piers. What do you mean by a railroad pier?

A. A pier operated under the direct supervision of the railroad or its accredited agent. I do not mean a pier that is operated by the owner of the traffic.

Q. Do you know who is operating the Canton Railroad pier at Baltimore?

A. I do not know.

Q. You do not know?

A. No.

Q. Would it surprise you to know that the Army is operating that pier right now?

A. I absolutely do not know anything about the
227 situation at Canton.

Exam. DISQUE. You could not handle this traffic over your own piers at Norfolk. So what have you got to say about that?

The WITNESS. I beg your pardon?

Exam. DISQUE. You could not handle this traffic over your own accredited piers. There is a little too much of it.

The WITNESS. That is an operating matter I have not touched on, Mr. Examiner.

Q. (By Mr. MACGUINEAS). And furthermore, Mr. Hodkinson, a considerable number of these tariffs specifically provide that they shall be applicable to traffic moving over Army Bases, do they not?

A. Not as far as the application of the export rates are concerned.

Exam. DISQUE. Is there an overcharge then? If the tariff says that the rates will apply to Army bases, why do you not apply the export rate to this Army Base?

The WITNESS. We have applied the export rate, Mr. Examiner.

Exam. DISQUE. I think Major Heimbaugh read a tariff yesterday which says that the rate shall apply to Army bases on export traffic.

Mr. Cousins. And I think be admitted at the time that those rates were being applied.

The Witness. Those are the rates we are applying, as far as I know.

Exam. Disque. But no allowance is made. All right.

228 Q. (By Mr. MacGuineas). Mr. Hodkinson, do your exhibits demonstrate that the cost of unloading at the piers at Baltimore over the Canton Railroad piers is included within the line haul rate?

A. Within the limitations laid down in the tariff, that is correct.

Q. And it is also true, is it not, that your line haul tariffs incorporate the terminal operations by the omnibus rule?

A. That is correct.

Q. So that in effect your line haul tariffs do hold out to shippers that if they export through the designated port referred to in the tariff they will receive shipside delivery when that is provided for in the terminal tariff, is that so?

A. Provided there is no interference with the railroad operations.

Q. Your tariff does not say that, does it? I am asking you what your tariff provides.

A. The tariff provides that no allowance will be made to the owners of the property specifically at some points.

Q. I am talking about what rates your hold out to the shipper.

A. The export rates to the shippers?

Q. Yes.

A. So long as he does not operate the pier.

Q. The tariff does not say that, does it?

A. It says railroad operated piers. I read into
229 the record the piers over which this allowance or this practice would be applicable.

Q. Your Norfolk tariffs do not say "railroad operated piers", do they?

Exam. Disque. You are talking now about the tariff which makes the allowance?

Mr. MacGuineas. Yes. The terminal tariff which is incorporated into your line haul tariffs.

Exam. Disque. Let us see how it reads.

The Witness. The tariffs specifically name the piers and those piers are operated by the railroads or their accredited agents.

Q. (By Mr. MacGuineas). All the tariff says is Transport Trading and Terminal Corporation, for example?

A. Yes.

Q. Or Imperial Tobacco Warehouse.

A. There is no longer any Transport Trading and Terminal Company operating a pier.

Q. I am asking you what the tariff says.

A. The tariff says that but as a practical matter they are not operating the pier.

Exam. DISQUE. You mean the tariff can not apply to something that is not in existence?

The WITNESS. Exactly.

Exam. DISQUE. Why have you not provided facili-
230 ties for handling this great volume of traffic?

The WITNESS. You will have to ask an operating man that question, Mr. Examiner.

Q. (By Mr. MACGUINEAS). Mr. Hodkinson, you do not know what actual services are being performed or in the alternative for which the railroads are making allowances to the Army on Army traffic at other ports, do you?

A. Not specifically. I understand at various ports the Army is operating piers which is not exactly the situation at Norfolk.

Q. You do not know what the actual situation is at those operations, do you?

A. Not of my own knowledge, but I have been advised that there are other piers that are operated by the Army in connection with which they do not get any allowance any more than they get at Norfolk.

Q. Have you also been advised there are piers operated by the Army where the Army is unloading the cars and is getting an allowance from the carriers?

A. I have heard rumors to that effect. I do not know how true they are.

Q. All your information about actual port operation is rumor, is it not, Mr. Hodkinson?

Mr. COUSINS. I object, Mr. Examiner. I put Mr. Hodkinson on to testify solely to the tariffs and not with
231 respect to practices. He will be followed by a witness who will have some greater familiarity with practices.

Mr. MACGUINEAS. Your witness has made some statements about what is going on at the other piers. I want to bring out that he does not know what is going on at the other piers. That is true, is it not, Mr. Hodkinson?

The WITNESS. Yes.

Mr. COUSINS. I am perfectly willing to have Mr. Hodkinson's testimony on this restricted to the tariffs.

Q. (By Mr. MacGuineas): Do you know, Mr. Hodkinson, whether the allowance for terminal services which is provided in the Norfolk tariffs is deducted before prorating?

A. I know positively that it is not, so far as the trunk line carriers are concerned.

Q. I did not get that.

A. It is not so far as the trunk line carriers are concerned.

Q. How do you know that? Do you actually know that yourself?

A. I am chairman of the division's committee for the Trunk Line Association and that is among my other duties. That expense is not prorated between the line haul carriers.

Q. You mean it never came to your attention?

A. It is not prorated between the line haul carriers.

Q. The usual practice is to deduct the terminal charges before prorating, is it not?

A. Certain terminal charges, but not these.

232 Q. What about the unloading charges covered by the Southern Railroad tariff?

A. I am not testifying as to those tariffs.

Q. You do not know anything about them?

A. No, sir. I am talking about the practice of the trunk line carriers.

Q. You do not know anything about what happens under the Southern tariffs, do you?

A. No, I do not. I know that the official lines do not participate in it. If the Southern Lines get anybody to prorate it, they do not get the Northern Lines to participate in it to any extent.

Q. Mr. Hodkinson, your testimony speaks at some length about the maintenance of the port differentials by the rates?

A. Yes, sir.

Q. That port differential was maintained prior to 1942, was it not?

A. Prior to 1932.

Q. But not since?

A. Then there was a gap; then we restored the port relationships, using Baltimore as the basic rate as contrasted with New York prior thereto.

Q. That was done when?

A. That has been continuous since 1932.

233 Q. And that port relationship of the rates took into account the absorption of terminal charges at Norfolk, did it not?

A. No, sir. It took into account the export or the import rate to and from Norfolk with relation to the other North Atlantic ports.

Norfolk was placed on the same basis as Baltimore. The Baltimore rates did not comprehend any terminals at Baltimore.

Q. What was that last statement?

A. The Baltimore rates did not comprehend any terminals at Baltimore.

Q. I was asking you about Norfolk.

A. You have to go to Baltimore first, because Baltimore sets the pattern for Norfolk.

Q. You say the Norfolk rates were set in relation to the Baltimore rates; is that correct?

A. Yes, sir.

Q. In accordance with that your Norfolk rates were set at a certain level that included to the extent specified in your terminal tariffs the performance of shipside delivery, did they not?

A. They included this wharfage and handling performed under the limitations of the tariff.

Q. They included the absorption of that by the carrier?

A. Yes, sir.

Q. Well, now, today if the carriers make exactly
234 the same allowance to the Army that they made to the terminal operators here in Norfolk before 1942, that would not upset your differential, would it?

A. No; but it would open the door wide for similar treatment to the owners of property that likewise operate piers.

Q. But you agree it would not upset your differential?

A. It would not upset the differential, no.

Mr. MacGuineas. That is all.

Q. (By Mr. Winn). I have a few questions.

Mr. Hodkinson, the complaint prays that as an alternative to the payment of an allowance to the complaint that the Commission reduce the import-export rates to and from Norfolk by the amount of the allowance sought for wharfage and handling.

If the rates applicable on import-export domestic water traffic were reduced by an amount to cover this terminal service, would that have any adverse effect upon rate differential adjustment to and from the North Atlantic ports?

A. I believe it would, very decidedly.

Q. Would it be possible to have the line haul rate to Norfolk reduced and have the other North Atlantic ports continue their higher adjustment on competitive traffic?

A. No, sir.

Q. In your Exhibit 8, page 7, you show the distances to Norfolk and to the other North Atlantic ports from representative points in Official Territory. You also

235 show the average rate.

From that exhibit it appears that the distances to Norfolk from representative points in Official Territory are 838 miles as compared with 804 miles to New York.

A. Yes, sir.

Q. So that the distance to Norfolk is greater than the distance to New York?

A. From these 106 base points.

Q. From the base points?

A. Yes, sir.

Q. In spite of that greater distance to Norfolk, Norfolk actually enjoys today lower rates than New York, does it not?

A. Yes, sir.

Q. The comparison of rates and distances that we have just had between Norfolk and New York shows the same results when you use Baltimore and Philadelphia, is that not true?

A. As far as distance is concerned, Baltimore has a lower distance.

Q. So that in spite of distance, Norfolk now has more favorable rates than the other North Atlantic ports?

A. Distance considered, yes.

Q. Distance considered?

A. Yes, sir.

Q. If those present favorable rates to and from Norfolk were reduced, that advantage would be increased, would it not?

236 A. Oh, yes.

Q. (By Mr. MacGuineas). Along the line of your testimony which you have just given, if the line haul rates were reduced only by the allowance which is now provided in the tariff for unloading services at the terminals and that obligation of the carriers were eliminated, there would not be any decrease in the net overall cost to the shippers for exporting through Norfolk, would there?

A. You have to think of the whole picture at Baltimore. You have a separation—

Q. Answer the question.

A. I can not answer your question "yes" or "no". If Baltimore is going to have a separation of the line haul and the terminal charges, we would be faced with the same situation for the other ports.

As I mentioned about New York, we have terminal charges at New York that are somewhat in excess of the terminal charges at Norfolk. That would mean the line haul rates to New York would be reduced, and you would have the same propositions right on up the coast.

Q. Mr. Hodkinson, let us confine ourselves to the cost to the shipper who is exporting through Norfolk.

Under the existing tariffs the shipper pays the line haul rate only and gets shipside delivery, does he not, subject to exceptions?

237 A. Subject to exceptions, yes, sir.

Q. If you reduced your line haul tariff by the amount of those terminal allowances and imposed those upon the shipper separately, the overall cost to the shipper exporting through Norfolk would be just the same as it is now?

A. That is assuming the terminal expenses remained the same. They might go up or down.

Q. If they go up or down, no matter who performs them?

A. If they go down, then he is that much ahead again.

Q. Subject to the fluctuation in the cost of the performance of that service, the overall cost to the shipper through Norfolk is the same under either rate structure, is it not?

A. If the terminal expense remains the same, the overall cost would be the same, yes, sir. But it goes a little further. You can not stop this thing at the Port of Norfolk if you are talking about the separation of line haul and terminal charges. You have to go to Baltimore. The Baltimore rate applies to points inland. It is exactly the same as the domestic basis. If there is going to be separation of line haul and terminal rates, God knows where the adjustment would end.

Q. Mr. Hodkinson, is it not true that basically your export rates were set with regard to the entire cost to the shipper of a movement to the foreign port; that is, with regard both to the rail and to the ship movement?

238 A. No, sir, that is not the case at all. After the port relationship had been destroyed by the Commission's prescription of class rate in Docket 15879, it became apparent that it was highly desirable not only from the railroads' but from the shippers' standpoint to restore the port relationships. Baltimore was selected as the representative point on which to build this new plan, principally because of its shorter mileage.

You will note on page 7 of my Exhibit 8 that Baltimore has the shortest average distance of any of the ports.

The only cases where Baltimore did not make the rates are places in Michigan where New York controlled the situation.

We considered Baltimore with exactly the same rates that applied on domestic traffic, and from that we built up New York and Philadelphia to maintain the port relationship in so far as Boston and Norfolk were concerned and Boston with regard to New York and Norfolk with regard to Baltimore.

Q. With respect to the inland rates to Norfolk, the controlling factor in their determination is to maintain the differential in terms of the inland rates to Baltimore, is that not true?

A. It is, with regard to the Baltimore situation. That is, to bring to substantial parity Norfolk with Baltimore.

Q. So that the exact mileage from an inland point is not the controlling factor in the setting of the rate to Norfolk?

A. I did not claim it was.

239 Q. I am asking you.

A. It was a controlling factor in determining the reasonableness of that particular rate.

Q. Within the limits of reasonableness, your rate is set with reference to maintaining the Baltimore differential?

A. The Baltimore relationship.

Q. Rather than the exact mileage or distance?

A. Yes, but in doing that the Port of Norfolk has had a greater reduction under the domestic rate than any other port, Baltimore being practically on the domestic basis.

Mr. MacGuineas. That is all.

Q. (By Mr. Winn). Mr. Hodkinson, this differential adjustment of rates to the North Atlantic ports—is it a competitive adjustment which disregards the variations in service rendered at the different ports?

A. I would say that it is necessarily so.

Q. Its purpose is to create an overall competitive relationship rather than to reflect slight or even substantial variations in the operations at different ports?

A. That is correct.

Q. If we should separate the line haul and terminal factors, and the terminal factors should vary from port to port, how could you maintain stability in that differential adjustment?

A. I do not see how you could, and, furthermore, you would be faced with reductions in your domestic
240 rates at points just short of the ports.

Q. You would have Fourth Section problems there?

A. Yes, sir.

Mr. WINN. At this point in the record, Mr. Examiner, I wish to cite decision of the Commission in Wharfage Charges at Atlantic and Gulf Ports, 93 I. C. C. 157, I. C. C. 633, where the Commission investigated the question of separating the terminal and line haul factors at length, went into the advantages and disadvantages at great length, and concluded that they should not be separated.

That is all I have.

Mr. MACGUINEAS. I have one further question in connection with your answer to Mr. Winn.

Q. (By Mr. MACGUINEAS). As I understood you, you stated that a separation of the line haul export rate, breaking that down into just the rate plus a separate charge for your terminal services would affect your domestic rates.

I do not understand how that is so. You have different rates now for domestic and export traffic, do you not?

A. Not at Baltimore and not at New York, from quite a number of points.

Q. But you do at Norfolk?

A. Oh, yes.

Mr. MACGUINEAS. That is all.

(Witness excused.)

241 Mr. WINN. Mr. Examiner, the parties have kindly cooperated with me and have allowed me to put on my witness for the Port of New York Authority at this point. I do not believe he will take more than fifteen minutes.

I will call Mr. Laux.

EDWARD K. LAUX, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. WINN). Please state your name and your capacity with The Port of New York Authority.

A. My name is Edward K. Laux. I am employed by The Port of New York Authority in the capacity of traffic manager. Our office is located at 111 Eighth Avenue, New York City.

Q. Outline your transportation experience.

A. For the past 33 years I have been engaged in traffic and transportation work, serving in various capacities such

as General Freight Agent, Freight Traffic Manager, General Traffic Manager for Coastwise Steamship Lines, and more recently as Traffic Manager, War Department Contractors, and American Newspaper Publishers Association, and have been in my present position since June 1st of this year.

Q. Are you familiar with the issues in this proceeding?

A. I have carefully perused the complaint and have a general understanding of the issues before the Commission in this proceeding.

242 Q. What is The Port of New York Authority?

A. The Port of New York Authority was created under a compact between the States of New York and New Jersey during the year of 1921 for the comprehensive development of the Port of New York, the future planning and protection of the port, and the better conduct of the commerce passing in and through the Port of New York; the increase and improvement of transport and terminal facilities therein and the more economical and expeditious handling of such commerce.

Q. What is the interest of the Port of New York Authority in this proceeding?

A. The Port Authority is authorized by statute to intervene in any proceeding affecting the commerce of the Port of New York, and the Port Authority has the duty of protecting New York in its competition with other ports, including Norfolk.

The Port of New York is in keen and substantial competition with the Port of Norfolk and with all other North Atlantic ports and Gulf ports in the handling of export, import, coastwise and intercoastal traffic.

The level of rail rates to and from New York and to and from the others ports are import factors in this competition. The advantages of one port in rates operates to divert to that port traffic which would normally move, and in the past has moved, through New York.

The present complaint asks, among other things,
243 that the level of the line-haul rates on export, import, coastwise and intercoastal traffic to and from Norfolk be reduced, and the Port of New York has a vital interest in the issue whether Norfolk rates should be so reduced.

Q. Please state the position of the Port Authority in regard to the complaint.

A. The Port Authority takes no position with regard to the reparation award sought by the complainant. It likewise takes no position with respect to allegation that

the failure of the railroads to pay an allowance for wharfage and handling at the government-owned Army Base Piers 1 and 2 at Hampton Roads, Virginia, is in violation of the Interstate Commerce Act. However, we do oppose the alternative prayer of the complaint that rates be established covering separately wharfage and handling and that the line-haul rates to and from Norfolk be reduced by the amount of the separate terminal charges so established.

It is our fear that should rates be established on the basis sought, it will have a tendency to break down the application of uniform rates to and from port districts.

We feel certain that were rates constructed by deducting from the line-haul rates to and from Norfolk the rate in cents per 100 pounds for wharfage and handling, a calamitous situation would ensue and an anomalous basis of rates would crop up in application to and from the entire
244 North Atlantic range of ports.

The rate structures to and from the North Atlantic range of ports include all ports from Hampton Roads, Virginia to Portland, Maine and are on a definite port relationship. Competition for shipping off shore, coastwise, intercoastal, canal and lake from and to these ports has been keen for years and the present rate structures have played a very prominent part with regard to the commerce to and from the ports.

It is natural that any change in the line haul rates to and from Hampton Roads ports would spread to New York and to other North Atlantic ports. This situation could not, in our opinion, be avoided.

Consequently any proposed change in the rate levels to and from the Hampton Roads ports would force immediate action on our part to have a relative adjustment in the scale of rates that now apply to and from the Port of New York.

One of the primary advantages of the one-factor method of stating rates to and from the ports is the stability and fair relationship between the ports which can be maintained. Where terminal charges, such as wharfage and handling, are separately stated an element of instability is introduced, and flexibility of service destroyed, and the task of maintaining fair competitive rates as between the ports is made much more difficult or impossible. It is the total charge to or from shipside in which a shipper is interested. If
245 terminal charges are to be separated out of the present one-factor rates, there will inevitably be

changes in these separately stated terminal charges from time to time, and each port will seek to gain a competitive advantage by reductions in these separate terminal charges. The port differential relationships which have generally been maintained for many years might well be destroyed if the important terminal charges are separately stated and subject to manipulation.

The subject of rates and differentials applicable to import and export and other water traffic, also their application to include full services to and from shipside, have been considered by the Commission since the early days and invariably no change in the present general practices were recommended.

It is quite obvious, in our opinion, that the rate structure in effect today includes the complete service and any attempt to break the rate structure down to separate any particular part of the service would be detrimental to the interests of the port and shippers there, the steamship lines and also the carriers.

Lighterage services and unloading of freight from and to railroad cars, also lighters, at and within New York lighterage limits has been performed under the provisions of the tariffs of railroad and coastwise lines and other types of carriers over a period of many years, almost a century.

Typical of the tariff arrangement is Trunk Line
246 Tariff Bureau I. C. C. A-788 issued by Agent W. S. Curlitt. Over all these years during which freight rates were revised tariffs of the carriers continued to hold out to the public these lighterage services, also loading and unloading as included in the rates. Hence it must be presumed that the freight rates were made to include the delivery to or receiving from steamships. In no sense is it a free service.

Mr. WINN. Cross examine.

Cross Examination.

Q. (By Mr. MACGUINEAS). As I understand it, Mr. Laux, you have no interest in this case at all except that you oppose a breakdown into a separate line haul charge and a separate terminal charge?

A. That is correct.

Mr. MACGUINEAS. No further questions.

Exam. DISQUE. That is all.

(Witness excused.)

Exam. DISQUE. We will recess until 1:15.

(At 12:00 noon, hearing adjourned until 1:15 p.m.)

AFTERNOON SESSION 1:45 P. M.

Exam. DISQUE. The hearing will be resumed.

E. S. NEILSON, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. COUSINS). State your name and occupation.

247 A. E. S. Neilson, freight traffic manager, Pennsylvania Railroad.

Q. Mr. Neilson, you are freight traffic manager, Pennsylvania Railroad?

A. Yes, sir, Eastern Region.

Q. What is the nature of your duties?

A. General supervision over the making of rates on merchandise traffic and the procurement of traffic.

Q. Does that include the supervision of port practices?

A. Yes, sir.

Q. At such ports as Norfolk, Baltimore, and Philadelphia?

A. Yes, sir.

Q. Is it not a fact, Mr. Neilson, that for a number of years you have had a particular interest in these port matters on behalf of your railroad?

A. Yes, sir.

Q. And are well acquainted with the port practices?

A. Yes, sir. I was division freight agent at Baltimore and foreign freight agent of our railroad for four years before I came to my present duties.

Q. Will you please explain the historical background of the practice of loading and unloading freight at North Atlantic ports?

A. The loading and unloading of cars by railroads containing water-borne freight at seaboard piers at

248 North Atlantic ports has existed for a good many years, and I believe prior to the time of any railroad officers now alive. This practice is believed to have originated at the outgrowth of competition with the Coastwise Steamship Lines in the early days of the railroads, and also as an outgrowth of the lighterage service performed at various ports but on a larger scale at New York than the other ports. If the ship docks at a railroad pier, it is more economical to unload the car than to perform lighterage to alongside the ship.

It has always been the effort of the railroads serving the various North Atlantic ports to keep them related as

to cost of service through such ports on the long established port relationships. Sometimes the method of delivery made it difficult to maintain these relationships on a handling charge which varied according to the place and method of delivery, and I believe the loading and unloading by the railroad has been influenced considerably by this effort to maintain port relationships.

A practical reason for performing the service was that in most cases neither the shipper nor the receiver was present at the port to handle the transshipping arrangements. This is true especially in cases where through export or import bills of lading had been issued. The issuance of through export and import bills of lading is a practice of many years' standing, antedating by
249 many years the first World War. Further, it is desirable in order to prevent pilferage, and so forth, to confine the pier operations to as few people and organizations as possible. Also there are times, particularly on freight to be delivered to ships, when the railroad in order to release cars desires to unload on pier awaiting arrival of ship.

At the ports of south of New York where a much greater percentage of ships dock at railroad piers, the practice is for the vessels to handle between hold and pier, and the railroad between car and pier. However, where freight may be placed by ship's tackle in an open car or removed by ship's tackle from an open car, it is not the practice for the railroads to assume any part of the loading or unloading.

This, as a whole, has provided the most practicable and efficient method of handling water-borne freight.

Q. Has there been any restriction of the loading practice to railroad or other types of piers?

A. Yes. Originally the practice of free loading and unloading was accorded only at the railroad piers for the reasons already mentioned, and although the practice has been somewhat expanded at North Atlantic ports, it is still restricted in principle to railroad piers. By this I mean piers operated by the railroads or public piers designated by the railroads in their tariffs to supplement railroad facilities, where the latter are inadequate to handle
250 railroad freight interchanged with vessels. For example, at Baltimore, where the several railroads have adequate pier facilities, the practice is restricted to railroad piers, and the railroads do not load or unload

freight on other piers. At Wilmington, Delaware, and Camden, New Jersey, the railroads use only the municipal piers, and the practice is accorded only to freight moving over those facilities. At Philadelphia, where railroad facilities are inadequate, the tariff provisions are broader, including railroad, steamship, and other public piers, but the tariffs specifically exclude "piers controlled by the owners of the traffic."

Q. In a general way explain any qualifications or limitations contained in the tariffs in respect to the loading and unloading practice.

A. In providing for the loading and unloading of waterborne freight the port tariffs carry and have always carried certain limitations or restrictions.

For illustration:

(a) At piers where open cars can be placed alongside of ship the ship loads and unloads the car as the car is a convenient place to pick up or place the freight.

(b) Generally speaking bulk freight, heavy articles exceeding 3 tons in weight, and liquids moved in tank cars, are not accorded loading and unloading service. The shippers must make their own arrangements and the
251 railroads assume no part of the expense.

(c) To be entitled to this privilege the freight must move in road haul service at a minimum rate of 10 cents per 100 pounds.

(d) The handling service is actually performed by the railroads, either through employees or agents, and not by the shipper in consideration of an allowance. At most of the North Atlantic Ports the tariffs contain merely the obligation to provide the service, and say nothing about cost or compensation as this is unnecessary when the railroad either performs with its own employees or contracts with some stevedoring organization to do it. The tariff situation at Norfolk has followed a somewhat different course as the practice resulted from the absorption of the charges of the Norfolk & Portsmouth Belt Line Railroad, and somewhat similar language crept into the tariffs when the practice was extended to other piers served by the individual lines. Nevertheless, the payments made to public pier operators at Norfolk are not allowances and should not be so characterized. It is the amount of compensation paid by the railroad to the pier operator acting as its agent, and reference to the absorption of 60 cents per ton for loading or unloading is necessary only to restrict the cost.

(c) As already mentioned, the privilege is restricted to certain piers which the railroads have designated as
252 adequate to meet their needs and is not accorded on piers of the owners of the freight. Incidentally, when the owner moves his freight through his own facility it is usually to get some service the railroad or Public Pier does not perform or to secure storage at less than railroad charges.

At Baltimore, where the railroad piers accommodate by far the greatest part of the water-borne freight, the practice is confined largely to railroad piers, and the Interstate Commerce Commission in the McCormick Warehouse Case, 148 I. C. C. 299, declined to permit the extension of this loading and unloading to the piers of the Terminal Warehouse Company. At Philadelphia, as previously stated, the tariff specifically excludes "Piers controlled by the owners of the traffic."

As a matter of principle the railroads have excluded from this privilege freight passing through space leased to shippers or receivers on the piers at Baltimore, Philadelphia, and Municipal piers at Camden, New Jersey, and Wilmington, Delaware.

Q. Please state when the loading priyilege was established at Norfolk and explain its origin.

A. I have no records showing that the enormous volume of business passing through the Army Base at Norfolk in World War I was handled differently than now, that is, the Government assumed the cost of unloading or loading the freight cars. While I had no hand in it, my belief from
253 a review of records is that the practice of paying 1 cent per 100 pounds wharfage and 3 cents per 100 pounds for loading or unloading had its inception in efforts to develop or retain post war traffic. The origin of the 3 cents per 100 pounds handling charge, so far as I can find, first appeared in a tariff issued by A. R. King, Port Director, Port Commission of Norfolk, Virginia, namely, A. R. King's, I. C. C. No. 1, effective November 1, 1920. This tariff was headed "City of Norfolk, Virginia" in large type and in parenthesis "Port Commission of Norfolk, Virginia" in large type and in parenthesis "Port Commission of Norfolk, Virginia", below which the words "Municipal Terminals" appeared, and applied to export and outbound coastwise, and import and inbound coastwise freight. Various other charges were shown along with the 3 cent per 100 pounds loading and unloading of freight

cars on piers. These charges subsequently appeared in the Norfolk & Portsmouth Belt Line Railroad Tariff I. C. C. 57, effective April 2, 1921, and the New York, Philadelphia & Norfolk Railroad Tariff I. C. C. 3328, effective April 15, 1921, provided that on export and import freight to or from points beyond Buffalo, Pittsburgh, and other Trunk Line termini the freight rate would include 1 cent for wharfage and 3 cents per 100 pounds for handling, but would not apply on freight in open cars. From this it is my belief the method of assuming the cost of loading or unloading at the various terminals had its inception as indicated.

I am further under the impression this was done
254 for two reason:

(1) To meet the competitive situation at Newport News, Virginia;

(2) To meet the situation at other North Atlantic Ports, thus making the Municipal Terminal, which apparently embraced also the Army Base, competitive for the post war commercial freight.

Q. Please explain further the development of extension of the practice at Norfolk.

A. In 1925 the Pennsylvania Railroad entered into a contract with the Norfolk Tidewater Terminal, then operating the Army Base as a public pier facility, whereby the Terminal acted as agent for the railroad in providing and operating a railroad facility.

The Pennsylvania Railroad had no pier facility of its own in Norfolk and it desired to provide a service which would be attractive to shippers and to secure an agent to solicit the movement of water-borne freight via the railroad. In lieu of the usual form of rental, the railroad undertook to pay the Terminal 20 cents per ton on railroad freight moving over the pier. This payment was termed compensation for wharfage. The railroad also employed the Terminal to load freight to and from cars, and the compensation fixed for this service was 60 cents per ton.

The arrangement with the Tidewater Terminal
255 continued until July 1, 1940, when the Army Base was taken over by the Transport Trading and Terminal Corporation. The latter company, as a public pier operator, was then subsfituted in the Norfolk port tariff.

Q. Please explain why the railroads have declined to pay an allowance or perform the service, as the case may be, at the Army Base.

A. When the Army took over the Army Base in 1942 for its own purposes and undertook to handle Government

freight, the railroads did not extend the privilege to the Army on the theory that it is a private pier operator, like any private shipper who decides to operate his own pier for the advantages and convenience of his own business. The refusal of the railroads to pay an allowance on Government freight is consistent with their declination to pay allowances to any shippers at North Atlantic Ports. In the early negotiations with the railroads the Army officer in charge of the pier demanded only an allowance.

It was not until May 1, 1943, that the Government requested the Pennsylvania Railroad to perform the unloading of certain cars. This request was made by letter from General Kilpatrick to the General Freight Agent at Norfolk on the theory that a prerequisite to complaint to the Commission "appears to be the request from this port that the various carriers perform the services or make
256 an allowance in lieu." By letter of May 22, 1943, General Kilpatrick extended this request to all of the Norfolk lines, saying:

"It is requested that the carriers meet their legal obligation by performing unloading service, when line haul rates cover such service. Arrangements should be made by all the Norfolk lines individually or jointly, to unload such traffic consigned to Hampton Roads Port of Embarkation, Army Base, Norfolk, Virginia, as a permanent operation."

The railroads have declined to perform the service at the Army Base, or to employ the Army as their agent, for the reasons that have already been mentioned, to wit, that the handling of water-borne freight on private piers, or piers controlled by the owners of the traffic is not held out by the railroads at North Atlantic Ports generally.

"Q. In your opinion, how would the principles you have explained be affected if the railroads should accede to the demands made by the operator of the Army Base?

A. The railroads are apprehensive that to accede to the Army's request would destroy the principle which has served to restrict this port practice to the purposes under which it arose, and to hold the practice within reasonable limits. The railroads have no desire to penalize the government and government freight has always had the advantage accorded the freight of other shippers, when handled over designated piers.

The absorption would be in effect at the Army
257 Base today on government freight if the Army had

not taken over the facility to obtain the advantages of control over its own freight. There are numerous private piers at Norfolk and the other North Atlantic ports which might claim the loading or unloading privilege on the theory advanced in this complaint.

To illustrate the situation I have had prepared an exhibit listing a number of industries located at the various North Atlantic ports who have piers served by rail sidings where freight can and at times is handled to and from vessels docked thereat.

This exhibit, consisting of 5 pages, is now offered for identification as Exhibit No. 21.

On page 1 are enumerated industries in the Baltimore, Maryland, port terminal area using privately owned or privately operated facilities having both a railroad siding and a deepwater pier where carload freight may be interchanged between railroad cars and vessels.

The other pages show similar information at various points, including Philadelphia, Chester, and Marcus Hook, Pennsylvania, Gloucester, Carneys Point, and Paulsboro, New Jersey, Eddystone, Pennsylvania, and Newark, New Jersey. The number of such industries could be increased had similar information been prepared for Bayonne, Jersey City, and Kearney, New Jersey, and other localities contiguous to New York Harbor. List of such industries
258 in the Norfolk area is to be submitted by another witness.

Q. From a tariff standpoint, what is the obligation of the railroads to provide pier facilities?

Mr. MacGuineas. Mr. Examiner, I do not think it has appeared that this witness is qualified to state what the tariff obligations were. We thought he was familiar with operating practices. I do not know that he is an expert as to what the tariffs provide.

Exam. Disque. He publishes the tariffs.

Mr. MacGuineas. Has that appeared from his testimony?

The Witness. My name is on the tariffs that carry these provisions as far as the Pennsylvania Railroad is concerned.

Mr. MacGuineas. All right.

Q. (By Mr. Cousins). Proceed.

A. The railroads have never held out in their tariffs at North Atlantic Ports to provide piers where vessels may dock. At some ports the railroads have piers and at other ports they have not. Piers are provided either by rail-

roads, steamship companies, municipalities, public terminals, or private concerns, in each instance to serve their own interests or the welfare of the port, as the case may be.

Generally speaking, tariffs are silent with respect to any undertaking to provide piers but the Norfolk and Portsmouth Belt Line Railroad, which serves the Army base, has a tariff provision disclaiming any such duty.

259 For illustration, paragraphs (b) and (c) of Item 865 of Norfolk & Portsmouth Belt Line Tariff I. C. C. 105, effective September 22, 1938, and currently in effect, provide as follows:

"(b) The carrier does not, under this Tariff, or as amended, * * * as to property which has been transported, or is intended to be transported over its lines, the carrier does not obligate itself to provide wharfage, storage or handling beyond the reasonable capacity of its property and facilities. All services undertaken to be performed by the carrier under the Tariff, or as amended, are further subject to Federal, State and Municipal laws and regulations. This Tariff, or as amended, does not apply on articles of a highly inflammable or explosive nature, or articles of an uncertain value.

"(c) The carrier does not, under this Tariff, or as amended, hold itself out to be a public wharfinger nor does it guarantee berths for vessels; and vessels reporting for loading or discharge (when berthed) will be berthed at proper piers in their order or priority; the carrier assumes no liability for demurrage to vessels, and all stevedoring (loading or discharge) will be subject to rules or customs of the port of Norfolk."

The pertinency of the above tariff provisions to traffic handled by the railroads which have a proprietary

260 interest in the Norfolk & Portsmouth Belt Line is apparent when considered in the light of the decision of the Commission in Docket No. 4611, where at 44 I. C. C. 460, it is stated:

"In view of these facts and of the exclusive control which the carriers exercise by virtue of their joint stockownership and equal representation on the Board of Directors, we are of opinion and find that the Belt Line is a part of the line of each of the owning carriers for terminal purposes."

The facts alluded to in the above quotation are lengthy and relate in part to the act of Legislature of Virginia under which the Belt Line was incorporated and the purposes for which it was constructed.

Q. Mr. Neilson, did you hear a witness for the Government testify that the Pennsylvania Railroad, among other railroads, had made certain payments to the Lincoln Tidewater Terminal with respect to freight handled over the United Nations Depot?

A. Yes, sir.

Q. At Norfolk?

A. I did.

Q. Are you familiar with what the Pennsylvania has done in that respect?

A. I am.

Q. Explain what it is.

A. The question of paying those wharfage and unloading or loading allowances was taken up with us by
261 the Norfolk Tidewater Terminal people—

Q. The Lincoln Tidewater.

A. The Lincoln Tidewater Terminal people, and after a number of discussions we finally concluded, based on information they gave us, to pay the bills if they would certify that they were not the consignee—that is, consigned to or by the government and not the property of the government but were handled in their capacity as a commercial public pier operator and as commercial freight.

Q. Has that company submitted any bills to you?

A. Yes, sir.

Q. For government freight?

A. Yes, they have.

Q. What have you done with respect to them?

A. We have sent them back and declined to pay them.

Q. Did you hear the witness refer to a check made by the Pennsylvania in the amount of something like $93?

A. Yes, sir.

Q. Do you know anything about that?

A. I do not unless it was a payment made before we had these discussions with the Lincoln Tidewater Terminal people, or it might represent a payment for one of those bills which were passed on the basis of certificate. I do not know.

Q. If it was not on the basis of the certificate, it was a mistake?

262 A. Yes, sir.

Q. There have been no other payments of that nature on government freight?

A. No, sir.

Mr. Cousins. Mr. Examiner, I would like to offer in evidence Exhibits 8 to 21, inclusive.

Exam. Disque. Received.

(Defendants' Exhibits 8 to 20, Witness Hodkinson, received in evidence.)

(Defendants' Exhibit 21, witness Neilson, received in evidence.)

Mr. Cousins. Anything else you want to say?

The Witness. No, sir.

Mr. Cousins. Cross examine.

Cross Examination.

Q. (By Mr. MacGuineas). Mr. Neilson, it is not entirely true that in the North Atlantic ports the absorption by the carriers of terminal charges has been limited to services on railroad piers, is it?

A. Not on railroad piers, but I think I qualified that by saying on public piers at certain places.

Q. You think it has been limited to that entirely?

A. Yes, sir. That is my understanding of it.

Q. Are you aware, Mr. Neilson, that the Southern Railway tariff covering export traffic into Norfolk specifically provides for the absorption of wharfage and handling charges on traffic moving over the Imperial Tobacco Company's warehouse?

263

A. I am not testifying as to the Southern Railway tariffs. I am testifying as to the Pennsylvania Railroad tariffs or generally the trunk line situation. I am not familiar with what Southern Railroad tariffs contain.

Q. So that all of the testimony which you have given with respect to tariff provisions and practices only relate to the Pennsylvania or, at most, to the trunk lines?

A. That is correct.

Q. Mr. Neilson, are you aware that Pennsylvania Railroad tariff 1378-H, I. C. C. 2613, specifically provides for an absorption of wharfage and handling charges up to 60 cents a ton on export-import traffic over the Imperial Tobacco warehouses at Norfolk?

A. Yes, sir.

Q. That is a private facility, is it not?

A. It is.

Q. So that is an exception to your general statement?

A. That is a peculiar situation. Most of the tobacco of the Imperial Tobacco Company moves from the south, the Kentucky-Tennessee territory, where we do not participate to any appreciable extent, and I understand, further, it is the practice of that company not to present bills for freight in which they have ownership. An examination of

our records up to January 1, 1939, discloses one
264 shipment handled there where we paid wharfage. The shipment was not consigned to them but to the Corn Products Refining Company.

Q. The tariff does not contain any limitation as to ownership of traffic, does it?

A. No, sir, it does not.

Mr. Cousins. When you said "up to 1939" you meant from here back to 1939, did you not?

The Witness. I meant from this date back to 1939, yes, sir.

Q. (By Mr. MacGuineas). And the Norfolk tariffs do not contain the provisions contained in some of the other tariffs to which you refer excluding the allowance in the case of traffic moving over piers controlled by owners of the traffic?

A. No. It specifically states the piers over which it shall be applied. We control the situation in that way.

Q. One of those piers which you specifically designate in the tariffs is the Lincoln Tidewater Terminals, is it not?

A. Yes, sir. That is in the tariff.

Q. If that is so, what is your tariff authority for refusing to make the allowance to Lincoln Tidewater Terminals on Army freight passing over that pier?

A. Well, we have taken the position that we make the allowance to them as a public pier operator, and when they do not function in the capacity of a public pier operator, we do not make the allowance to them.

265 Q. Do you yourself actually know how they do function?

A. We understand that they do in some cases and in some cases they do not. They had permission, as I understand it, at one time to handle commercial freight. I do not think they have that permission at the present time.

Q. You do not actually know what permission they have from the Army, do you?

A. No. We have them certify. We require a certificate from them before we pay the bills, as I referred a moment ago, that the freight is not consigned to or by the government or in which the government has ownership.

Q. Again your tariff designation of the Lincoln Tidewater Terminal makes no qualification of that sort, does it?

A. No, sir.

Q. Mr. Neilson, I believe you testified that these payments which the carriers have been making to the various term-

inals for wharfage and handling—your language is: "are not allowances and should not be so characterized."

A. Well, really, in effect, we employ these people to do the work for us. That is the thought I wish to convey there.

Q. You are aware, are you not, that the applicable tariffs specifically call these allowances?

A. In some cases they do, yes, sir.

Q. They do. But you think the tariffs are inaccurate in that respect?

266 A. No. I am getting at the purpose of the provision, that is, payment for services.

Q. If you made that allowance to the shipper for performing the service, it still would be a payment for the service?

A. Yes, but we call that an allowance when you allow that to the owner of the freight.

Q. But an allowance is a payment for services. You do not make an allowance except as a consideration for services rendered, do you?

A. There is a distinction there I think, in that this is service that we would perform if it went over our own piers and we have extended that practice to the public piers at that particular point.

Q. Well, the carriers in Norfolk at the present time do not have adequate facilities to handle the export traffic that passes through this port, do they?

A. They have not the facilities—I do not know about that, but I question whether they do have the facilities to handle all this enormous war movement, which is abnormal.

Q. It is export traffic passing through the port, is it not? A. Yes, it is export traffic, but it is at an abnormal peak and ordinarily is not provided for.

Q. Well, of course, no one can say how many years that condition is going to continue, I suppose.

A. I can not, but I hope.

267 Q. The abnormality may become normal, conceivably?

A. I do not know. If we use the experience of War 1, it does not, sir.

Q. Mr. Neilson, you are not familiar with the actual operation of the Army Base Piers in the first World War, are you?

A. No, sir.

Q. You made the statement in your direct examination: "I have no records showing that the enormous volume of business passing through the Army Base at Norfolk in World War I was handled differently than now."

You do not know whether there was an enormous volume of business passing through the Army Base at that time?

A. Let me answer a little more specifically. The Pennsylvania Railroad had no piers in Norfolk through which it could handle export freight during the period of the last World War and, looking up our tariffs to find out the history of the Norfolk Tidewater Terminal arrangement and so on, I went back as far as I could, and I found no tariff which provided for it.

The first tariff I could find was the NYF & N tariffs to which I referred in my statement, which was in 1921; so I concluded from that that the railroads did not participate in the cost of loading and unloading at that time. That is the basis for my statement.

Q. You do not know what the volume of business was then, do you?

268 A. I do not, sir. I was in the Army.

Q. Do you know that the Army Base Piers were not actually operated during the first world war?

A. My understanding was that they were started by the city and completed by the Army.

Q. Do you know when they were completed for operation?

A. I do not know, no, sir.

Q. You do not know that was after the close of the war?

A. I am under the impression it was not, but I do not know.

Q. And, again, you do not actually know whether the carriers or the shippers assumed the actual loading and unloading costs for such traffic as did pass through this port during the first world war, do you?

A. No, no more than what I have stated there, which is an assumption on my part.

Q. You referred to the Municipal Terminal at Norfolk. Do you know of what physical property that constituted?

A. My reference to that Municipal property is qualified. I have always understood the municipal pier to be those piers adjacent to the grain elevator which, as I understand it, were built by the city after the government, I presume the Army, took over and completed what is now known as the Army Base. The city built those piers there in conjunction with the grain elevator.

It is my understanding the idea of the grain elevator was they wanted bottom cargo for the ships to draw ships to the port.

Q. In other words, the Municipal Terminal during the first world war was what is now Army Base Piers 1 and 2, is that not so?

A. It was Army Base Piers 1 and 2, and it also at one time embraced this pier that I referred to adjacent to the grain elevator, which is now, I think, United Nations Depot.

Q. United Nations Depot?

A. Yes, sir.

Q. Is it your understanding that the carriers on traffic moving through the other North Atlantic ports are not paying the government any allowance for the terminal handling of Army freight?

A. I know of no place where we are doing it, speaking for the Pennsylvania Railroad.

Q. You are speaking only for the Pennsylvania Railroad?

A. Yes, sir.

Q. You would not attempt to say whether other carriers at ports may be making such allowances, would you?

A. No. I might know about it, but I can not recall anywhere where the carriers pay.

Q. As I understand it, the only objection that you have expressed to the payment of the same allowance to the Army which you formerly made to the terminal operators here is that you consider the Army to be in the same position as a private shipper and if you give that privilege to private shipper A, you would have to give it to every other private shipper, is that correct?

A. Yes, sir. We have had a policy that the custody of the freight was really the determining factor.

If the custody of the freight between rail and ship was that of the owner, the loading and unloading was not performed by the railroad.

If the ownership between the railroad and ship at certain ports was that of a public terminal, we have paid it.

Mr. Cousins. Excuse me. You said "if the ownership." I think you meant "custody."

The Witness. I meant custody, yes, sir.

Q. (By Mr. MacGuineas). If in this case the Commission should take the position that the government, because of the wartime exigencies, is not in the same position as a private shipper, the basis of your fears would fall down, would it not?

A. I think you would have a constant effort to get it. We have turned down people who were private pier operators.

Q. In other words, you have had petitions from private pier operators even before the government claimed the allowance?

A. Yes, sir.

Q. That is a continuing state in the—

A. We have that ever before us in our dealing with
271 this question, and we have tried to pursue a consistent policy based on who has custody of the freight.

Exam. DISQUE. Why do you make that distinction?

The WITNESS. That seems to be the soundest way to get at it. That is the consistent way to get at it.

Exam. DISQUE. You go on the theory since you have provided pier—

The WITNESS. We provide a facility for the public generally on equal terms and when somebody handles it through his own facility the public is not in position to avail itself on equal terms.

Exam. DISQUE. He can get his freight loaded on the ship if he uses your pier. If he elects not to use your pier, that is his hard luck?

The WITNESS. Yes, sir.

Mr. WAGNER. May I ask, Mr. Examiner, in that connection, how that applies at Norfolk, for example, where the Pennsylvania does not maintain any facilities for the handling of export freight?

The WITNESS. We have arrangements with certain terminals here, certain public terminals. On the movement of traffic through the Lambert Point Dock, Inc., which is a public terminal with which we have an arrangement to day; I can not remember all the others, but we have five or six in our tariff.

272 Mr. WAGNER. You have no facilities of your own?

The WITNESS. No, I stated that in my earlier testimony.

Q. (By Mr. MACGUINEAS). You do not contend that the Lambert Point Dock is anywhere near adequate to handle the traffic moving through the port of Norfolk today, do you?

A. I do not contend it is possible to handle all of your Army freight through there, no, sir. I think it is adequate to take care of the commercial freight.

Exam. DISQUE. Is any government or Army freight moving over the private docks at Norfolk now, do you know?

The WITNESS. I can not answer that. I have not checked it.

Q. (By Mr. MACGUINEAS). Let me ask one or two further questions about these payments which you say the Pennsylvania has made.

A. Yes, sir.

Q. On traffic handled over Lincoln Tidewater Terminal.

A. Yes, sir.

Q. You, yourself, do not have personal knowledge as to whether that was commercial traffic or whether that was Army traffic, do you?

A. I did not look at it, but I looked at some of the way bills and I remembered that some of it was mahogany logs moving to a commercial consignee, and some of it was corkwood moving to the Armstrong Cork Company.

Q. You are not prepared to say that every pay-
273 ment which the Pennsylvania has made for traffic moving over Lincoln Tidewater Terminals has been restricted solely to commercial traffic?

A. Our directions to the people who pass the bills for payment are that they must have that certificate to which I referred, and, furthermore, our people who prepare the bills and submit them to the auditor were directed to check the way bills to see about the consignee of the freight and determine that it was commercial freight.

Q. You do not know what the other carriers are doing in that respect, do you?

A. I do not know.

Mr. MACGUINEAS. That is all.

(Witness excused.)

CHARLES R. SEAL, was sworn and testified as follows:

Direct Examination.

The WITNESS. My name is Charles R. Seal. I am traffic director of the Baltimore Association of Commerce, address 22 Light Street, Baltimore, Maryland, an intervener in this proceeding.

Our intervention and interest are confined to the alternative prayer of the complaint which seeks a separation of the line haul rates from the charges for handling. As I understand that part of the prayer, it is not for the future limited to Piers 1 and 2, but applies to the entire
274 Port of Norfolk, nor as I read the complaint, is it limited to government traffic so far as the future is concerned.

We appear in opposition to the principle of separate handling charges. The rates at North Atlantic ports have applied to shipside as far back, I suppose, as anybody's memory goes and beyond that. We regard that as a logical way of applying the rate and feel that any separation would disrupt not only the rates and practices as they apply at Norfolk but would by force of competition extend to other North Atlantic ports, including Baltimore.

If such a separation is made we are fearful that the handling charges would be superimposed upon the present line haul rates. If that happens Baltimore and other North Atlantic ports would be placed at a competitive disadvantage with New Orleans and other southern ports, as well as Montreal and other Canadian ports with which the North Atlantic ports are in keen competition under normal conditions.

The rates from interior competitive territory points, such as Chicago, Cincinnati, and so forth, to New Orleans are now lower than those to Baltimore by amounts ranging from 15 cents first class to 3 cents sixth class and, generally, 3 cents in connection with commodity rates.

The addition to our rates of a handling charge would place upon us a further handicap in our competition with New Orleans and would have the same effect on our
275 competition with Montreal.

The present Montreal rates are the same as the Baltimore rates on import traffic and the same as the Philadelphia rates on export traffic.

I can testify from my more than 16 years' experience at Baltimore that our competition with Montreal is very keen. The same is true as to New Orleans, particularly from the territory beyond Chicago—Indianapolis—Cincinnati line and west. In fact, in the past in normal times we have had great difficulty in drawing traffic from Chicago, Cincinnati, Indianapolis, and west in competition with New Orleans.

I mention that to show some of the dangerous possibilities of the alternative relief sought in this complaint.

I have an exhibit that I want to offer which shows the New Orleans rates in comparison with those to the Atlantic ports from Chicago and Cincinnati.

In support of my testimony with reference to the relationship between North Atlantic ports and New Orleans, I wish to identify an exhibit entitled: "Export and Import Rates Between Chicago-Cincinnati and North Atlantic Ports-New Orleans."

This shows first the fifth class export and import rates and the distance between Chicago and Cincinnati and the North Atlantic ports and New Orleans.

I offer that in evidence, Mr. Examiner. From it you will see that the rates to New Orleans are substantially
276 lower in the reverse direction than those to and from Baltimore.

(Intervener's Exhibit 22, Witness Seal, received in evidence.)

Cross Examination.

Q. (By Mr. MacGuineas). You understand, do you, that the alternative prayer in our complaint requests a reduction in the line haul rates to Norfolk to be accompanied with a corresponding tariff setting up a charge for the handling, so that the overall rate would remain the same as it is now?

A. Well, that would not necessarily be the outcome if the Commission saw fit to find in your favor, because the Norfolk rate, like some of the other port rates, is water-depressed and most likely any handling charge would be superimposed on the existing rate.

We are very fearful that is what would actually happen.

Q. But that is not what we are asking.

A. I understand that, but that is something you may not be able to control if the Commission makes that sort of a finding.

Mr. MacGuineas. That is all.

Q. (By Mr. Wagner). Did you hear the testimony of Mr. Laux, this morning?

A. I did, and generally I concur in what he said.

Mr. Wagner. That is all.

(Witness excused.)

277 W. W. Wolford, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. Reynolds). Are you assistant freight traffic manager of the Seaboard Air Line Railway?

A. I am.

Q. What are your duties as such?

A. I am engaged in handling rate matters and litigation in connection with rate matters before the Interstate Commerce Commission and various State Commission.

Q. Have you made a study of the complaint now being heard?

A. I have.

Q. Have you prepared some exhibits bearing on the issues raised by that complaint?

A. Yes, sir.

Q. Please proceed in your own way to give your testimony and identify your exhibits.

A. First I wish to identify the map as Exhibit No. 23. This map is a map of the Norfolk and Portsmouth Belt Line in the Norfolk and Portsmouth area, and it includes various terminals and dock facilities that have been discussed in this case.

You will notice at the top part of the map there is a terminal facility that has been enclosed in dotted lines. That is the Army Base here under discussion. The dotted line is that portion of the Army Base that is west of Hampton Boulevard.

278 The tracks on the right hand side are also tracks belonging to the base, and I understand they are also under a separate fence. I have never seen the fence myself and I do not know what the boundaries are.

On the east side of Hampton Boulevard, outside of the dotted line is the area referred to by Witness Burrows as Qm Junction. That is the location of the track where Witness Burrows testified lots of cars destined for the Army Base were cut off—the engine was cut off and they were left there to be moved into the Army Base at the direction of the yard master of the Army Base by either the Belt Line engine or the Army engines, which were under his control.

Q. Under whose control?

A. Under control of the Army yard master.

Mr. MacGuineas. Is this witness testifying of his own knowledge or is he testifying about the other witnesses' testimony?

Mr. Reynolds. I am not repeating what the witness has said.

Mr. MacGuineas. He is not testifying of his own knowledge as to this, is he?

The Witness. I am just identifying the localities that the other witnesses talked about.

Q. (By Mr. Reynolds). Go ahead.

A. You will observe there I have shown half of the
279 Army Base with the word "Navy" on it and the other half with the word "Army" on it. I was out there in June myself and saw this center fence running through the Army Base and I was told—

Mr. MacGuineas. Of what year?

The WITNESS. This year, about a month ago. And I was told by the railroad's joint agent located in the yard that separated the Navy from the Army parts of the base and afterward in checking the analysis of the tonnage that moved into the base which I subsequently checked, I did notice there was considerable traffic destined to the Army base and to the Navy Supply Officer.

As the dotted line shows the fence as it is between Piers 1 and 2, I heard no testimony of any one who knows as to what the significance of that fence is or what it separates. I certainly do not know.

On the north side of the Base you will see that there is also another interchange track there designated as the chain gate interchange. That is also the second interchange that was mentioned by Witness Burrows in his testimony.

Q. (By Mr. REYNOLDS). What is your next exhibit?

A. My next exhibit is No. 24, which is Seaboard Air Line Railway Company Tariff I. C. C. A-8091. That is one of the tariffs that was referred to in the complaint.

I wish to call particular attention to Item 5 therein which states the rules and charges published herein
280 are applicable only to line haul traffic when handled on export bill of lading or domestic bill of lading marked for export or coastwise or for Pacific Coast, provided that within 48 hours after arrival at the port the carrier's agent is notified by the shipper or consignee that such freight is intended for export, coastwise or Pacific Coast movement, and so forth.

The particular significance of that item, in so far as my present testimony is concerned, is that that does not anywhere provide for traffic coming in here to the Army Base marked for export that may go into storage at the Base, into one of those eight warehouses that are out there. Such traffic as that would not come within the terms of this tariff.

Item No. 20 under the caption of "Norfolk" is the next item I wish to refer to. Those are the terminals at the City of Norfolk that the Seaboard shows over which it handles commercial traffic and makes the allowance where the rate has shipside application to the operator of the dock for the unloading and wharfage charge.

Mr. MACGUINEAS. May I interrupt at this point?

Your tariff does not say anything about commercial traffic, does it?

The WITNESS. No, sir.

Mr. MACGUINEAS. That is an interpolation of yours, is it not?

The WITNESS. That is just a general statement of mine.

281 Q. (By Mr. REYNOLDS). Proceed.

A. The next item I wish to call attention to is Item No. 70 which reads as follows:

"Freight moving under carload shipside rates is entitled to and will receive only one delivery or placement."

My particular purpose in calling attention to that is the controversy that has arisen over whether railroads should make a second movement of the car after it is turned loose by them and placed on one of these hold tracks at the direction of the Army base.

My interpretation of that item is it does not authorize that second handling of the car by a railroad.

Q. Does that conclude your comments on Exhibit 24?

A. Yes, sir.

My next exhibit will be No. 25, which is a reproduction of uniform or standard form of agreement entered into between the Seaboard Railway and such terminal operators as it may elect to authorize to perform the terminal services the railroad obligates itself to perform under rates given shipside application.

We have a standard form of contract that is used not only by the Seaboard Railroad but by the other Southern Territory lines serving Norfolk, and this is a copy of that standard form of contract. It is the same contract that we do have with other terminals here.

282 Q. Have you any comment you wish to make on that exhibit?

A. Yes. There is one spot I want to refer to when I can locate it.

Q. I will ask you to comment on the portion in Paragraph No. 3 on the first page.

A. Paragraph 3?

Q. Yes.

A. It will be seen that provision is in regard to absorbing the charges and that the provisions in regard to absorbing the charges shall not apply to traffic that is the property of the terminal. Under that provision we do not make any wharfage and handling allowance to even these terminal operators with whom we have the contract to act as public terminals for us. If they handle any of their own traffic they would not get any such allowance in that respect. The treatment that they are receiving is the same treatment that we are according to the Army Base in declining to allow it any wharfage and handling on its traffic.

It will be seen under Paragraph 16 on the second page of that exhibit the underscored part shows where the carriers reserve the right to police and verify all such operations, meaning the operations of the terminal as they affect the handling of the property that the railroad turns over to them to handle. Under the present operation arrangement between the Army base and the railroads, the rail-
283 roads have no opportunity to police and verify those operations.

Mr. MacQUINEAS: I move to strike that last answer. It does not appear this witness has any information as to present operations or what the Army would permit them to do. He is not entitled to state what opportunity the carriers would have to do the service if they wanted to do it. He has never asked anybody what they want to do.

Q. (By Mr. REYNOLDS). Do you know whether or not the carriers now have the opportunity to police and verify all such operations?

A. Yes. I know that we do not.

Q. At the present time?

A. Yes.

Q. Does that conclude your comment on Exhibit 25?

A. Yes. Exhibit No. 26 contains copies of O. D. T. General Order 16(a), General Permit O. D. T. 16(a)(1), and administrative order O. D. T. 17. Inasmuch as complainant's witness has testified that the so-called QMRWE Number denotes export traffic and that notice of the export character of the traffic is stamped on the freight bill, without regard to whether the bill of lading itself states: "for export" or only contains the QMRWE number, it becomes necessary to go into the actual significance of that QMRWE number.

The first provision I wish to call attention to is contained on Sheet 2 of the exhibit, which is also Sheet 2 of General Order O. D. T. 16(a). It will be noted there that they de-
284 fine what is export freight and they also define what is overseas freight. The two terms are not synonymous.

Other provisions of this O. D. T. order supersede—to be specific Paragraph 502-202 on Sheet 4 of 16(a)—provides that no persons shall offer for transportation and no carrier shall accept for transportation any carload to the port area named, any carload of overseas freight to or within the port area named or for storage within such port area or for delivery to any ocean carrier at such port area, un-

less there is outstanding an effective O. D. T. unit permit authorizing the transportation of such shipment.

That is the QMRWE number as appeared on these shipping papers which is supposed to designate the export character of the traffic. It will be seen that the kind of traffic it really designates is overseas traffic; that is, traffic of any kind destined beyond the continental or territorial limits of the United States under the definition of overseas traffic heretofore mentioned. It not only includes anything coming within the definition of export traffic but it also includes any water-borne traffic passing over those piers that comes within the definition of overseas traffic. I have in mind such traffic there as might be loaded on a ship for consumption or to be expended without going to a foreign destination.

Mr. MacGuineas. Will you read the definition of overseas freight again and tell us how you could apply food that the crew eats to that.

The Witness. I am not thinking about the food
285 that the crew eats so much as I am thinking about traffic that the ship might leave here with and transfer to another ship as supplies for that other ship or for supplies of any sort. Ships like that are usually referred to as "tender ships" and they take traffic outside the continental area and distribute it as supplies to other ships. They are engaged in the transportation of supplies from shore to ship.

Q. (By Mr. Reynolds). Proceed.

A. Another provision I want to call particular attention to is the provision for storage within the port area, traffic intended for storage in the warehouses or outside storage of the Army Base would, as I understand it, have the permit on it. When that traffic goes into these warehouses it loses its identity as export traffic if it ever had any.

Q. Where is that provision?

A. That is the same provision, paragraph 502-202 I just read, and it reads as follows—

Mr. MacGuineas. Mr. Examiner, I wish to object to this sort of testimony by the witness. We have here official regulations promulgated by a government agency. Those regulations speak for themselves and I do not see that this witness is any better qualified than anybody else in the country to say what the government meant when it put out some official regulations. The regulations are the best evidence of what they mean.

Mr. REYNOLDS. I think it will be sufficient if you
286 will call attention to the regulations which you think are significant here.

The WITNESS. I think that particular part is significant, in that it, as I interpret it at least—

Mr. MACGUINEAS. We do not want this witness to interpret it. He is not entitled to interpret it. He may say "Look at Paragraph so and so," but I do not think he is entitled to do more than that.

Exam. DISQUE. That is all Mr. Reynolds asked him to do.

Mr. MACGUINEAS. That is not what he is proposing to do.

The WITNESS. I call attention to the provision for storage within such port area. That is in that same paragraph. That is the last thing, I believe, I have to mention in that exhibit.

Exhibit No. 27 is a chronological history of the Army Base at Norfolk and it consists of five pages of history to which is attached copies of correspondence between the War Department, on the one hand, and the railroads serving the Army base, on the other hand, regarding the making of allowance to the Army base.

Q. (By Mr. REYNOLDS). Is the material in the exhibit material that you got from the files of the Seaboard Air Line Railway Company?

A. Yes, sir.

Exam. DISQUE. You mean the history?

The WITNESS. Yes, the history.

287 Q. (By Mr. MACGUINEAS). You got them from where?

A. The files of the Seaboard Air Line Railway.

Q. I should like to ask a few questions as to the qualification of the witness. Can you tell where in the files of the Seaboard Air Line Railway you will find a demonstration of the fact that the Army Supply Base was built by the Federal government during World War I?

A. I can not right at the moment, but I am satisfied I can in a few minutes.

Q. You saw that in the files of the Seaboard Air Line?

A. I must have.

Q. Did you see it? Did you prepare this exhibit?

A. I did not prepare it myself personally.

Q. Who prepared this exhibit?

A. It was prepared under my direction.

Q. You did not actually look at the documents in the Seaboard Air Line office?

A. No; I did not examine each document. I read this after it was prepared and looked at such as I wanted to look at.

Q. You refer in the first paragraph to a lease of the Army Supply Base to the City of Norfolk under an agreement of November 20, 1919.

A. Yes, sir.

Q. Did you get that lease from the files of the Seaboard?

A. I either had the lease or had a letter from one
288 of the parties to the lease that gave that information.

Q. Did you see that yourself?

A. I do not recall.

Q. You do not know. Then, further, at the end of the first paragraph you refer to a new agreement between the City of Norfolk and the Secretary of War cancelling the former agreement dated April 20, 1919.

A. Yes, sir.

Q. You did not get that new agreement out of the files of the Seaboard, did you?

A. I certainly did.

Q. The actual agreement?

A. I do not know that the actual agreement was there, but either the actual agreement or a copy.

Mr. Reynolds. The witness is not undertaking to state the terms of any agreement. This purports to be nothing more than a brief history of the Army Base. He is not going into the terms of the different agreements.

Mr. MacGuineas. The history consists of a series of facts. If it is to be brought out, it should be brought out by witnesses who know the facts. I do not consider this proper evidence. This is given by a man who admittedly does not know the facts and he says he think's he got it from some letters in the files of the Seaboard Railway.

The Witness. I am prepared to give you the exact
289 source of every fact in here, if you want to take time to go into it.

Mr. MacGuineas. All right. I want you to do that.

The Witness. All right. I have as much time as you have.

Mr. MacGuineas. May we do that now?

Mr. Reynolds. No. That is cross examination.

Mr. MacGuineas. This is a part qualifying the witness and I am entitled to ask qualifying questions.

Mr. Reynolds. He has stated where he got the information. It is the usual information contained in the files.

The railroads have contacts with these different people who operated the piers and the files show these facts. He is not undertaking to go into the agreement.

Mr. MacGuineas. If there was such an agreement the way to prove it is to produce the agreement.

Mr. Reynolds. We are not offering to prove the contents of the agreement.

Mr. MacGuineas. If they existed a copy of them is proof of the existence.

Mr. Reynolds. We are not trying to prove that the agreement provided for thus or so. All he said was that a new agreement was entered into between the City of Norfolk and the Secretary of War cancelling the former agreement dated November 20, 1919.

Mr. MacGuineas. He does not know whether such agreement was entered into.

Mr. Cousins. His files indicate that.

290 Mr. Reynolds. Anybody can find it by going over to the City Hall and looking at it. There is nothing secret about them. We do not want to prove the contents of the agreement.

The Witness. Will you let me state the purpose I prepared it for? It was to show the relation between the railroad on the one hand and the various owners of this property over the period of years on the other hand, and those facts that are stated in there, whether they be facts or not, are what we have in our files and are the things that influenced us in our relations with those people.

Mr. MacGuineas. If this witness will qualify his testimony by saying that these are considerations which the Seaboard took into consideration but that he does not purport to testify as to whether they are true facts or not, I will withdraw my objection.

Q. (By Mr. Reynolds). Will you so qualify?

A. I certainly do, yes. That history has been gone over to a great extent already and I have no desire to comment on it.

Q. Suppose you take up your next exhibit.

A. The next exhibit is No. 28 and consists of four pages. It shows the arrangements between the Southern Territory lines and the public rail-water terminals in the Hampton Roads area and practices of the Southern Territory lines in regard to all private industries having waterfront terminals engaged in handling their own traffic. The purpose

291 of this is also similar to the purpose of the others.

I merely set forth here the relationship of the railroads to each of these public terminals, which goes over to and includes all of pages 1, 2, and 3, and the semi-public terminal. That is, it has a dual personality. I refer to the Imperial Tobacco Company. It has a public warehouse, and then there are the private terminals composing the Naval operating base and the individual industries named at the bottom of page 4. That sets forth our relationship with each of those terminals and it shows that there is no inconsistency in the treatment accorded the Army Base and each of these terminals.

I have no further comment to make.

Q. Take up your next exhibit, No. 29.

A. Exhibit No. 29 consists of two pages and is an excerpt from Agent R. H. Hoke's Southern Export Tariff, I. C. C. 903. On the second page it reproduces item 160. I may say here this is the tariff carrying the line haul rate from interior destination into the port of Norfolk. Under this Item 160 it will be observed it provides except as otherwise provided in this tariff rates published do not include handling or other charges.

Then Item 155 also quoted on the first page and continued on page 2 provides under paragraph numbered 1, that the rates named in this tariff apply only, and one of the conditions is that the traffic does not leave the possession of the inland carrier until delivered to the ocean carrier or to its agents.

292 Paragraph No. 2 provides that the rates named in this tariff apply on traffic which leaves the possession of the inland carrier or its agent after arrival at the port, when provision for the application of the export rates under such circumstances is covered by a transit tariff on file with the Interstate Commerce Commission.

I have in mind traffic that goes into the possession of the consignee and is placed in a warehouse by him.

Mr. MacGuineas. Have you any comment on paragraph No. 4?

The Witness. That has nothing to do with the point I am about to make.

Mr. MacGuineas. Very well.

The Witness. Or that I just made.

Exam. Disque. Did not I hear yesterday read that this absorption at public piers does not apply on traffic from the south?

The Witness. We do have this wide open or blanket application of shipside rates but it is not true from the south

This matter is having attention and further advice will be given you at an early date.

Very truly yours,

/s/ E. R. Oliver
Vice-President.

381

Exhibit No. .....
Witness: .....
Page No. 31

Subject: Army Base—Wharfage and Handling Charges.

Norfolk & Portsmouth Belt Line Railroad Company
Norfolk, Virginia (10) December 8, 1943.

H. L. White, Jr.,
Vice-President and General Manager

J. R. Kilpatrick,
Brigadier General, U. S. Army,
Hampton Roads Port of Embarkation,
Newport News, Virginia.

Dear General Kilpatrick:

This will acknowledge receipt of your letter of November 9, 1943, file APTAK 548.3-TD, in regard to wharfage and handling charges at Army Base Piers Nos. 1 and 2.

The Norfolk and Portsmouth Belt Line Railroad Company publishes the tariff No. 6-J covering wharfage, handling and storage charges on export and import traffic for the benefit of its eight proprietary companies, and I am confident that they will fully consider your request.

Yours very truly,

/s/ H. L. White, Jr.,
Vice-President and General Manager.

cc—Mr. R. J. Doss, VP, ACL R. R., Wilmington, N. C.
Mr. Geo. Dunglinson, Jr., VP., N&W Rwy., Roanoke, Va.
Mr. J. F. Dalton, VP., NS. Rwy., Norfolk, Va.
Mr. W. S. Franklin, VP., Penna. R. R., Philadelphia, Pa.
Mr. E. R. Oliver, VP., Southern Ry., Washington, D. C.
Mr. T. E. McAndrews, VP., Virginian Rwy., Norfolk, Va.

EXHIBIT No. 3
WITNESS: HEIMBAUGH
PAGE No. .....

382

INTERSTATE COMMERCE COMMISSION

Docket No. 29117

UNITED STATES OF AMERICA, COMPLAINANT

v.

ABERDEEN AND ROCKFISH RAILROAD CO., ET AL.,
DEFENDANTS.

Statement
Showing the Export Application
Via Norfolk, Va.,
Of Rates in Representative Tariffs
Containing Class Rates and Commodity Rates
Also
Representative Rates on Classes and on Commodities
To Norfolk, Va.
In Effect 14 June 1942 and at Present
From Various Origins.

EXHIBIT No. .....
WITNESS: .....
PAGE No. 2

383

INDEX

	Page Nos. Incl.
Application of Class Rates from and to Trunk Line Assoc. Ty. (Curlett's ICC A-694, TLTB 80-C):	3-8
Application of Class Rates from Central Freight Assoc. Ty. (Jones' ICC 3642, CFA 490-B)	9-11
Application of Class Rates to Central Freight Assoc. Ty. (Curlett's ICC A-574, TLTB 79-B)	12-14
Application of Commodity Rates from Central Freight Assoc. Ty. (Jones' ICC 3758, CFA 518-N)	15-17
Application of Class Rates from and to Western Trunk Line Ty. (Curlett's ICC A-593 & A-767, TLTB 107-B & 107-C)	18-22
Application of Commodity Rates from Western Trunk Line Ty. (Kipp's ICC A-3475, WTL 329-H)	23-28
Application of Rates on Classes and Commodities from Southern Freight Association Ty. (Hoke's ICC 712, SFA 712-C)	29-32

Application of Commodity Rates from Southern Freight Association Ty. (Hoke's I C C 903, SFTB 705-F) 33-36
Items Containing the Omnibus Rule 37
Excerpts from Bill of Lading 38
Class Rates to Norfolk, Va., from Chicopee Falls, Mass., Providence, R. I., and Nixon, N. J. 39
Class Rates Between Norfolk, Va., and Wheeling W. Va., Youngstown, O., and Chicago, Ill. 40-41
Class Rates Between Norfolk, Va., and Minneapolis, Minn., Greeley, Colo., and Kansas City, Mo. 42
Class Rates to Norfolk, Va. versus Class Rates to Baltimore, Md., from Tampa, Fla. and Army Depot, Ga. 43-44
Class Rates to Norfolk, Va., from Enid, Okla., Fort Worth, Tex., Fresno and Redwood City, Calif. 45

EXHIBIT NO. .....
WITNESS .....
PAGE NO. 3

384

STATEMENT

SHOWING THE EXPORT, IMPORT, COASTWISE AND INTERCOASTAL APPLICATION

VIA NORFOLK, VA.,

OF RATES FROM AND TO TRUNK LINE ASSOCIATION TERRITORY STATIONS

PUBLISHED IN AGENT W. S. CURLETT'S TARIFF I. C. C. No. A-694

(Trunk Line Tariff Bureau Freight Tariff 80-C)

(Class Rates)

The application shown in this exhibit for this tariff is the same as in effect 14 June 1942.

Item 30-A

Import, Export, Intercoastal and Coastwise Rates versus Domestic Rates.

(a) The class rates published herein for application on import, export, intercoastal and coastwise traffic take precedence over other class rates between the same points via the same routes. From and to points shown on pages 7 to 32, incl., of tariff, as amended from and to which no import,

export, intercoastal and coastwise rates are specifically published herein, the class rates published on domestic traffic in other tariffs lawfully on file with the Interstate Commerce Commission from and to such points will apply on import, export, intercoastal and coastwise traffic and will be subject to rules and application of rates as published herein governing import, export, intercoastal and coastwise traffic.

(b) If the commodity rates, established in other tariffs lawfully on file with the Interstate Commerce Commission via the same routes for application on domestic traffic, produce a lower charge on any import, export, intercoastal or coastwise shipment that the rates contained in this tariff and as provided in paragraph (a), such commodity rates will apply.

Item 55-B

Certificate on Import Freight (Note).

Each bill of lading and shipping order covering import freight received from steamer dock, customs bonded warehouse, Appraiser's stores, initial carrier's stores, public warehouses or fumigation plants after having been fumigated under Federal regulations and inspection, entitled to an import rate or the application of import rules, regulations and charges shall bear on its face a certificate in the following form which must be signed by the shipper or his Agent:

385

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 4

IMPORT CERTIFICATE

.....(I) (We) hereby certify that the property covered by this receipt was imported in the .....(kind of vessel and its name) from .....(name of foreign port) arriving at this port on .....(Date of arrival) and has not been in any private warehouse (not public warehouse) but is transferred to railroad station direct from

.....(Steamer dock)

.....(Customs' bonded warehouse) .....(Appraiser's stores)

.....(Initial carrier's stores) .....(Public Warehouses)

or from fumigation plants after having been fumigated under Federal Regulations and inspection.

Shipper .....
By Agent .....

Note—In order to obtain the benefit of import rates or the application of import rules, regulations and charges, the certification referred to in this rule must be made at the time the shipment is tendered to the carrier.

Item 100C

Application of Import Rates. (For Exception, see Item Nos. 105 and 150 of Tariff)

Import rates named herein from stations shown on pages 5 and 6 of Tariff, as amended will apply on property received from foreign countries, viz.:

Canal Zone of Panama;
Cuba
Insular Possessions of the United States (Philippine Islands, Puerto Rico, Hawaiian Islands and Virgin Island), also

386

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 5

All points of origin not located in:
United States of America (including Alaska);
Canada (including provinces of Prince Edward Island, New Brunswick and Nova Scotia);
Newfoundland;
Islands of Miquelon and St. Pierre

and delivered to the rail carrier direct from ship's side or dock of vessel bringing such property to origin stations or on such property received by the rail carriers from customs bonded warehouses, appraisers' stores (not internal revenue stores) or public warehouses at the port of entry (see Note A) or initial carriers' stores, or fumigation plants after having been fumigated under federal regulations and inspection, within twelve (12) months from date of entry, provided same has not been trans-shipped at any other United States port (see Note B).

The rate to be applied will be that in effect on the date property is received by the carrier for transportation, either direct to destination or to an intermediate point for transit tariffs lawfully on file with the Interstate Commerce Commission.

NOTE A—In order to obtain the benefit of import rates on traffic stored in public warehouses, the owner or his agent must register such traffic at the port of entry, except as otherwise provided herein, with the Trunk Line Freight Inspection Bureau within twenty-five (25) days of the date such traffic arrived at such port of entry and at the time of reshipment furnish the carrier with evidence showing origin of such traffic as provided in Item 55 of Tariff, as amended, as well as date traffic was entered at the port of entry.

It is understood the actual inspection service at Norfolk and Lambert Point, Va. is performed by the Southern Weighing and Inspection Bureau.

NOTE B—Trans-shipment, as herein mentioned, means the unloading of traffic at any port, and subsequent reshipment thereof to another port under a new bill of lading or contract of carriage, but does not mean traffic which is transferred from one vessel to another for on-carriage under the terms of the original bill of lading taken out at time of forwarding at the foreign port from which traffic cleared on the first vessel.

Item 110-C

Application of Export Rates. (For Exception, see Items Nos. 115 and 150 of Tariff)

Rate basis Numbers named in this Section will apply on property consigned for export to foreign countries, viz.:

387

EXHIBIT No. .....
WITNESS: .....
PAGE No. 6

Canal Zone of Panama, Cuba, Insular Possessions of the United States: (Philippine Islands, Puerto Rico, Hawaiian Islands and Virgin Islands), also all destinations not located in: United States of America (including Alaska), Canada (including provinces of Prince Edward Island, New Brunswick and Nova Scotia), Newfoundland, Islands of Miquelon and St. Pierre

when exported direct from stations named on pages 5 and 6 of Tariff as amended, will only apply, except as otherwise provided herein on traffic which does not leave possession of the carrier delivered by the Atlantic Port Terminal Carriers direct to the steamer or steamers' dock upon arrival at the port or after storage or transit has been ac-

corded by the carriers under tariffs which permit the application of the export rates, and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given.

Shipments not consigned in shipping orders or bills of lading for export, which are ordered for export after arrival at seaboard, or outer holding yard or yards, will be subject to the rates, rules and regulations applicable to export traffic or the same as would have applied had the shipment been originally consigned for export, so long as the property has not passed from the possession of the carrier and is subject to a reconsigning charge of $2.97 per car.

Export rates will also apply on shipments consigned on bills of lading for export, destined to foreign countries or foreign possessions of the United States, handled through United States Navy Yards, Naval Bases or Army Bases or delivered to United States Government vessels docked thereat on presentation of proper evidence of exportation.

All shipments consigned to points covered herein for export are to be waybilled and bills of lading issued at the export rates named herein. Rate named herein to Baltimore, Md., on export property will apply on shipments delivered to vessels directly from railroad owned piers or piers leased to and operated by the Railroad Company at Baltimore, Md.

Item 120

Application of Intercoastal Rates from North Atlantic Ports. (For exception, see Item Nos. 125 and 150)

The Rate Basis Numbers named in this section apply on Intercoastal traffic originating at points on the Pacific Coast of the United States, Alaska and British Columbia also on traffic originating at interior Pacific Coast points moving via Pacific Coast ports, and moving via the Panama Canal, when arriving at origin stations named on pages 5 and 6 via vessel and delivered to the rail carrier direct from shipside or dock of vessel bringing such property to origin stations named on pages 5 and 6, provided same has not been trans-shipped at any other United States port (Note).

EXHIBIT No.
WITNESS
PAGE No. 7

NOTE—Trans-shipment as herein mentioned means the unloading of traffic at any port and subsequent reshipment thereof to another port under a new bill of lading or contract of carriage.

The rate to be applied will be that in effect on the date the property is received by the carrier.

Item 130

Application on Intercoastal Rates to North Atlantic Ports.
(For exception, see Item No. 150)

The Rate Basis Numbers named in this Section will only apply on traffic destined to points on the Pacific Coast of the United States, Alaska and British Columbia also on traffic destined to interior Pacific Coast points moving via Pacific Coast ports and moving via the Panama Canal, which is delivered by the Atlantic Port Carriers to the steamer or steamers direct upon arrival at the port or if storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the Intercoastal rates, and also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which intercoastal rates apply, which traffic is handled direct from carriers' stations to steamship docks and on which required proof of trans-shipment is given.

Shipments not consigned in shipping orders or bills of lading to a point on the Pacific Coast of the United States, Alaska or British Columbia for movement via Panama Canal, which are ordered to such destinations after arrival at the seaboard or outer yard or yards, will be subject to the rates, rules and regulations that would have applied had the shipment been originally consigned for such destination at the time of forwarding from point of origin.

Item 135

Application of Coastwise Rates from North Atlantic Ports.
(For exception, see Item Nos. 140 and 150).

The Rate Basis Numbers named in this section will only apply on Coastwise traffic originating at South Atlantic and Gulf Ports south of Albemarle Sound, and on traffic originating at inferior points moving via said ports, when arriving at origin stations named on pages 5 and 6, via vessel and delivered to the rail carrier direct from shipside or dock of vessel bringing such property to origin stations

named on pages 5 and 6, provided same has not been trans-shipped at any other United States port (Note).

NOTE—Trans-shipment as herein mentioned means the unloading of traffic at any port and subsequent reshipment thereof to another port under a new bill of lading or contract of carriage.

The rate to be applied will be that in effect on the date the property is received by the carrier.

389

EXHIBIT No. .....
WITNESS: ...../...
PAGE No. 8

Item 145

Application of Coastwise Rates to North Atlantic Ports
(For exception, see Item No. 150)

The Rate Basis Numbers named in this section will only apply on Coastwise traffic destined to South America and Gulf Ports south of Albemarle Sound, and on traffic destined to interior points moving via said ports, which is delivered by the Atlantic Port Carriers to the steamer or steamers direct upon arrival at the port or if storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of coastwise rates, and also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which coastwise rates apply, which traffic is handled direct from carrier's station to steamship docks and on which required proof of trans-shipment is given.

Shipments not consigned in shipping orders or bills of lading to coastwise points located in the United States south of Albemarle Sound, which are ordered to such destinations after arrival at the seaboard or outer yard or yards, will be subject to the rates, rules and regulations that would have applied if the shipment had been originally consigned for such destination at the time of forwarding from point of origin.

390

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 9

STATEMENT
SHOWING THE EXPORT, COASTWISE AND INTERCOASTAL APPLICATION
VIA NORFOLK, VA.
OF CLASS RATES FROM CENTRAL FREIGHT ASSOCIATION TERRITORY ORIGINS AS PUBLISHED IN AGENT B. T. JONES' TARIFF I. C. C. NO. 3642
(Central Freight Association Freight Tariff 490-B)

The application shown in this exhibit for this tariff is the same as in effect on 14 June 1942.

Item 3210-B

Application of Export Rates to North Atlantic Seaboard Ports of Export or Trans-Shipment.

The rates named in this tariff, or as same may be amended, and designated as "Export Rates", except as otherwise provided herein, will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamers' docks upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates, and also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which export rates apply which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation or transshipment is given.

Item 3260

Shipments handled through United States Navy Yards, etc.

(a) Coastwise, and intercoastal rates shown in this tariff, or as same may be amended, will not apply on shipments destined to foreign countries or foreign possessions of the United States nor to Pacific Coast points of the United States, Alaska, or British Columbia, or to interior Pacific Coast points via Pacific Coast Ports, nor to South Atlantic or Gulf Ports in the United States south of Albemarle Sound, handled through United States Navy Yards, Naval Bases or Army Bases, or delivered to U. S. Government vessels docked thereat.

(b) Export rates will also apply on shipments consigned on bills of lading for export, destined to foreign countries or foreign possessions of the United States handled through United States Navy Yards, Naval Bases or Army

Bases or delivered to United States government vessels docked thereat on presentation of proper evidence of exportation.

391

WITNESS: .....
EXHIBIT No. .....
PAGE No. 10

Item 3290

Application of rates to Virginia ports on coastwise, export and intercostal traffic.

Rates to Newport News, Norfolk and Richmond, Va., and points taking same rates as provided for in Item 3300, apply to points named below:

Station	*Railroad*	*Station*	*Railroad*
Lambert Point, Va.	N. & W. Ry.	Portsmouth, Va.	N. & W. Ry. Pennsylvania R.R. S. A. L. Ry. Southern Ry. Vgn. Ry.
Newport News, Va.	C. & O. Ry.		
Norfolk, Va.	C. & O. Ry. (See Note 1, below) N. & W. Ry. N. S. R.R. Pennsylvania R.R. S. A. L. Ry. Southern Ry. Vgn. Ry.	Richmond, Va.	A. C. L. R.R. C. & O. Ry. (See Note 3, below) R. F. & P. R.R. S. A. L. Ry. (See Note 2, below) Southern Ry.
Pinners Point, Va.	N. & W. Ry. Southern Ry. Vgn. Ry.	West Norfolk, Va.	Southern Ry.

Routing

Except as otherwise provided below, routing instructions provided on pages 857 to 910, will govern.

Shipments moving in connection with the Southern Ry. should be routed as provided on pages 912 to 914, To S. A. L. Ry., stations Norfolk and Portsmouth, Va., route N&W Ry., Kilby, Va. S. A. L. Ry., or via connections of the N. & W. Ry., Kilby, Va., S. A. L. Ry. or via connections to Suffolk, Va, thence S. A. L. Ry.

392

WITNESS: .....
EXHIBIT No. .....
PAGE No. 11

To Richmond, Va., in connection with A. C. L. R. R.; or S. A. L. Ry. route via:

Connections and N. Y. C. R. R. (W), Deepwater Bridge, W. Va., Vgn. Ry., Jarratt, Va., thence A. C. L. R. R.,

or

N. Y. C. R. R. (W.), Deepwater Bridge, W. Va., Vgn. Ry., Jarratt, Va., thence A. C. L. R. R., or
Connections and N. & W. Ry., Petersburg, Va., thence A. C. L. R. R., or
N. & W. Ry., Petersburg, Va., A. C. L. R. R., or
Connections and N. & W. Ry., Petersburg, Va., S. A. L. Ry., or
N. & W. Ry., Petersburg, Va., S. A. L. Ry., or
Connections and N. Y. C. R. R. (W), Deepwater Bridge, W. Va., Vgn. Ry., Alberta, Va., thence S. A. L. Ry., or
N. Y. C. R. R. (W), Deepwater Bridge, W. Va., Vgn. Ry., Alberta, Va., thence S. A. L. Ry.

NOTE 1.—To C. & O. Ry. station Norfolk, Va., rates on coastwise or intercoastal traffic will apply only on traffic handled over the terminals of the Southgate Terminal Corporation. Export rates to Norfolk, Va., via the C. & O. Ry., as a delivering carrier, do not include wharfage, handling or other terminal charges other than switching.

NOTE 2.—When for account of S. A. L. Ry., rates to Richmond Va., will only apply on traffic in cars alongside wharf of the Richmond Waterfront Terminals, Inc., and do not include absorption of terminal charges.

NOTE 3.—Rates published herein to Richmond, Va., via C. & O. Ry., as a delivering carrier, applicable on export, coastwise or intercoastal traffic, do not include wharfage, handling or other terminal charges other than switching charges.

396

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 15

STATEMENT
SHOWING THE COASTWISE, INTERCOASTAL AND EXPORT APPLICATION
VIA NORFOLK, VA.
OF COMMODITY RATES FROM ORIGINS IN CENTRAL FREIGHT ASSOCIATION TERRITORY
PUBLISHED IN AGENT B. T. JONES' TARIFF I. C. C. No. 3758.
(Central Freight Association Tariff No. 218-N)

Item 13500

APPLICATION OF COASTWISE RATES TO NORTH ATLANTIC SEABOARD PORTS

The rates named in tariff, or as same may be amended, and designated as "Coastwise Rates" will only apply on traffic destined to coastwise points located in the United

States south of Albemarle Sound, which is delivered by the Atlantic Port carriers to the steamer or steamers direct upon arrival at the port or if storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the coastwise rates, and also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which coastwise rates apply, which traffic is handled direct from the carrier's station to steamship docks and on which required proof of trans-shipment is given.

Shipments not consigned in shipping orders or bills of lading to a coastwise point in the United States south of Albermarle Sound, which are ordered to such destinations after arrival at the seaboard or outer yard or yards, will be subject ot the rates, rules and regulations that would have applied had the shipment been originally consigned for such destination at the time of forwarding from point of origin.

Item 13505

APPLICATION OF INTERCOASTAL RATES TO NORTH ATLANTIC SEABOARD PORTS

The rates named in tariff, or as same may be amended, and designated as "Intercoastal Rates" will only apply on traffic destined to points on the Pacific Coast of the United States, Alaska and British Columbia and interior Pacific Coast points via Pacific Coast Ports and moving via the Panama Canal, which is delivered by the Atlantic Port carriers to the steamer or steamers direct upon arrival at the port or if storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the intercoastal rates, and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which intercoastal rates apply, which traffic is handled direct from carrier's stations to steamship docks and on which required proof of trans-shipment is given.

EXHIBIT No. .....
WITNESS: .....
PAGE No. 16

Shipments not consigned in shipping orders or bills of lading to a point on the Pacific Coast of the United States, Alaska or British Columbia or to an interior Pacific Coast

point via Pacific Coast Ports for movement via Panama Canal, which are ordered to such destinations after arrival at the seaboard or outer yard or yards, will be subject to the rates, rules and regulations that would have applied had the shipment been originally consigned for such destination at the time of forwarding from point of origin.

Item 13515.

SHIPMENTS HANDLED THROUGH UNITED STATES NAVY YARDS, ETC.

Coastwise and intercoastal rates shown in this tariff, or as same may be amended, will not apply on shipments destined to Pacific Coast points of the United States, Alaska or British Columbia, or interior Pacific Points via Pacific Coast Ports, nor to coastwise points in the United States south of Albemarle Sound, handled through United States Navy Yards, Naval Bases or Army Bases or delivered to United States Government vessels docked thereat.

Item 14500.

SHIPMENTS HANDLED THROUGH UNITED STATES NAVY YARDS, ETC.

Export rates shown in this tariff, or as same may be amended, will also apply on shipments consigned on bills of lading for export, destined to foreign countries or foreign possessions of the United States handled through United States Navy Yards, Naval Bases or Army Bases or delivered to United States Government vessels docked thereat on presentation of proper evidence of exportation.

Item 14550.

APPLICATION OF EXPORT RATES TO NORFOLK, VA.

Export rates to Norfolk, Va., via the C. & O. Ry., as delivering carrier, do not include wharfage, handling or other terminal charges other than switching charges.

398

EXHIBIT No. 4
WITNESS:
PAGE No. 17

Item 14560.

APPLICATION OF EXPORT RATES TO NORTH ATLANTIC SEABOARD PORTS OF EXPORT

The rates named in this tariff, or as same may be amended, and designated as "Export Rates" except as

as it is from official territory. On traffic from the south, the individual rate in the export tariff carrying the line haul rate seems to specify that those rates shall not have shipside application. There may be 10 per cent of the rates in that tariff which will have such provision and the other 90 per cent would not have. There are not many rates in this tariff that do have shipside application.

293 Q. (By Mr. Reynolds): Will you take up Exhibit No. 30.

A. Exhibit No. 30 is an excerpt from Agent R. H. Hoke's General Import Tariff I. C. C. 902 published effective January 29, 1944. This is an import tariff carrying import rates from Norfolk into interior Southern Territory, and it will be seen that that tariff contains a terminal or transit note which provides: "In the absence of specific provisions in this tariff to the contrary, shipments transported under the tariff will be entitled to certain allowances and privileges, which include the allowance of storage if they are so provided in some other tariff."

Then in the same tariff there is a provision that on traffic stored, the import traffic may be stored at the port for a certain length of time and when it is shipped out it shall retain its identity as import traffic, subject to the transit requirement that it shall be registered within 25 days. That registration privilege or provision is contained in paragraph (c) on page 2. The export tariff does not contain any such provision as that. I have no desire to discuss that any further. It can be dealt with on brief.

Q. Take up your next exhibit.

A. The next exhibit consists of one page and will be numbered 31. It shows the number of cars of traffic via the Seaboard Railway during the period June 1, 1943 and May 31, 1944 handled into Norfolk and delivered to the

294 Hampton Roads Port of Embarkation at the Army Base. Those are the only carloads Seaboard handled in that the rates on which they moved were subject to shipside application. In every instance it is a fact, as the statement will indicate by comparing the applicable rate with the rate to Baltimore that the shipside to Baltimore, which is applicable to Norfolk on this traffic, is the rate that was applicable here because it was lower.

Q. The Baltimore rate is held as the maximum at Norfolk in order to comply with the Fourth Section?

A. Yes, sir. The item containing the domestic rate there shows that in no instance did the export rate charged plus

wharfage and handling exceed the level of the domestic rate. That is all I have to say about that exhibit.

Q. What is your next and last exhibit?

A. Exhibit 32 consists of one page and shows certain Seaboard Air Line Railway piers at Portsmouth, Virginia, and it shows the capacity of those piers as indicated by some past performance over those piers as compared with the number of cars actually moving over those piers recently.

The purpose of that is to show that those piers are capable of handling a great deal more traffic than they are handling today.

Q. Can you approximate the depth of water at those piers, can you state it approximately?

295 A. I have not examined any sea charts of that area. The only figures I have in mind are figures that were given me by our local people who work on the wharf.

Q. I will ask you if at the present time the piers or slips have been somewhat filled up and could be dredged or made deeper?

A. Oh, yes; they could be made deeper. That is all on that exhibit.

Q. Do you have anything else you care to say?

A. I believe I do want to add this: In the one year analysis I mentioned in connection with Exhibit 31 there was a total of 605 cars involved in that analysis and moving to the base, of which 189 of the cars had neither the block number or "for export" or the bill of lading, which I interpret to mean that even the Army Base people do not contend that they moved over the piers. It was local traffic. I merely point that out to show the extent to which the local traffic is moving into that base. That is all I have.

Mr. Reynolds. Mr. Examiner, I ask that Exhibits 23 to 32, inclusive, be received.

Mr. MacGuineas. Mr. Examiner, I should like to ask some questions before they are received.

Mr. Reynolds. The witness is tendered for cross examination.

Cross Examination:

Q. (By Mr. MacGuineas). Mr. Wolford, you have no knowledge that any shipment that ever moved over
296 Army Base Piers 1 and 2 since June 15, 1942, consisted of traffic which was transferred to another ship on the high seas, have you?

A. No. I have no knowledge of what became of a single car that was ever delivered there.

Q. So that you do not know whether there is any application at all to that situation that you discussed in your direct testimony?

A. I do not. It is the inability of the railroads to determine whether that is true or not which is one of the grounds we are depending on here to extend our non-allowance to you.

Q. Mr. Wolford, before the war if a commercial shipper sent goods on an export bill of lading through the Port of Norfolk and put it on to a ship, how would you determine whether or not that was transferred to another ship on the high seas?

A. We would not.

Q. You would not know?

A. No, we would not know that.

Q. If it were an applicable commodity under the line haul export rate you would apply the export rate and assume the shipside delivery cost, would you not?

A. Yes, because we would not know, but that would fall in the same category as any other violation of the law that the shipper might make. We would not expect to find all of them. He would finally make a mistake.

297 Q. Whether it is a private shipper or the government shipping, you would not know the situation that actually occurred?

A. We would not know if it occurred.

Q. Did you not pay commercial shippers on their certification it was exported?

A. Yes, sir.

Q. You pay the Army on its certification it is exported, do you not?

A. I think we are paying all of them on that certification, as far as I know.

Mr. REYNOLDS. Read that answer, will you please?

(The last answer was read.)

Mr. REYNOLDS. You are not paying the Army, are you?

The WITNESS. He is not speaking of the allowance. He is speaking of the line haul rate.

Q. (By Mr. MACGUINEAS). Applying the line haul export rate. Mr. Wolford, are you an attorney?

A. Yes, sir.

Q. Are you a licensed I. C. C. practitioner?

A. Yes, sir.

Q. Turn, please, to paragraph 3 of your Exhibit No. 27, the second paragraph. That is your legal conclusion as to the Interstate Commerce Commission to which you referred above, is that not so?

A. It could be so stated, yes, sir.

Q. Would you state it as anything differently?

298 A. I do not know as I would.

Q. I am asking you. You put it in here. I am asking you what it is.

A. It is my opinion.

Q. Your opinion that the I. C. C. decision is applicable to the Army Base situation, is that so?

A. Yes, sir, and it is so stated.

Q. I take it that is based on certain asumed facts, is that so?

A. It is based on the facts that are stated there.

Q. It is based on the fact that the Army Base is a private facility?

A. Yes.

Q. You are not testifying to that as of your own knowledge, are you?

A. I am testifying that in so far as its relations with the railroads are concerned, those relations are as a private facility.

Q. How much knowledge do you have of the actual operations on Army Base Piers 1 and 2?

A. None beyond the point where the railroad is prevented from knowing, and that is up to the point where we deliver you the cars, then we are through.

Q. You do not know how Army Base, Piers 1 and 2, is being operated at the present time?

299 A. I know in so far as railroad transportation is concerned it is being operated as a private industry.

Q. What do you mean by that? Can you define that?

A. Yes, sir.

Q. Do so.

A. We turn over the traffic to you in exactly the same way as we do to any other private industry. Beyond that I do not know anything about that and beyond that we have no right to know anything about it.

Q. Do you know how the traffic is handled at the Army Base piers?

A. Yes, sir.

Q. By the Norfolk Belt Line?

A. Yes, sir.

Q. Do you know that the Norfolk Belt Line engine brings the cars into the pier track that runs along the middle of the pier?

A. Yes, I know that, and I know the circumstances under which that engine is in there.

Q. Where did you learn about the circumstances?

A. I sat here and listened to sworn testimony.

Q. You are basing your opinion on the facts and the testimony of other witnesses?

A. No, sir. I have conducted a great deal of investigation beforehand.

Q. How did you do that?

A. By going out to the Army Base piers and talking to the people out there at the pier and having them down to my office and talking to them at great length down there.

Q. You got this information from some railroad employees who work around the Army Base? They told you?

A. That is one of the sources.

Q. What other source did you have?

A. I talked with other Norfolk Belt Line employees.

Q. Now, we have two sources. One is the testimony of other witnesses which you have heard in the hearing, and the other is conversation with railroad employees who work upon the base.

A. Exactly.

Q. Any other source?

A. From my own observations out there of such things as I saw.

Q. Just where did you go when you were out there?

A. I went to the main Hampton Boulevard gate and the guard told the group of us that we would have to go into a building there beside the gate and get permits. So we went in there and told the young lady where we wanted to go and to whom we wanted to talk. So she called on the phone to some place, I do not know where, talked to somebody at that time and in due course she proceeded to issue us some permits that we pinned on our coats, which authorized us to go and talk to the railroad's joint agent in warehouse 4. So we proceeded to go down to the warehouse and hunted up his office and had a great deal of trouble finding it and talked with him two or three hours.

301 Q. What else did you do?

A. We got into an automobile and in coming out we circled around a little bit in order to be able to see as much of the piers as possible, and came on out.

Q. You did not go on to the piers?

A. No, sir, we did not try to go on to the piers.

Q. There is a fence that shuts off the pier from the rest of the base, is there not?

A. No, sir.

Q. There are guards there?

A. I did not see any that seemed to be prohibiting anybody from going on. There were one or two military guards.

Q. You did not try to go on to the base?

A. No. We did not have any authority to go on, so I did not.

Mr. REYNOLDS. I will say for the information of the gentleman that so far as handling cars to the Army Base is concerned, the lines I represent will rely on the testimony given by Mr. Burrows this morning as to the manner of the handling of the cars.

Mr. MACGUINEAS. Will you make an explicit statement that the testimony of the present witness is not to be taken as any evidence of facts as to the actual mode of operation within the Army base?

The WITNESS. That is all right.

Mr. REYNOLDS. Yes. I will make that statement.

302 Q. (By Mr. MACGUINEAS). Mr. Wolford, will you refer to Exhibit 28, please? Did you prepare these paragraphs which purport to describe the mode of operating the various terminal facilities?

A. I prepared some of it and some of it was prepared for me under my direction. It was kind of a joint operation.

Mr. MACGUINEAS. For the record, may I ask counsel, is this witness intended to be a witness giving facts of the operation at these various terminals?

Mr. REYNOLDS. I will have to ask the witness what he says about that.

The WITNESS. The same answer is true here as it was of the other exhibits. These are the facts as we believe them to be and on which we have acted in our relationship with each of these terminals.

Q. (By Mr. MACGUINEAS). You are not prepared either through testimony or through the exhibit to be giving evidence of the actual facts of operation at the piers, is that correct?

A. That is correct.

Q. Mr. Wolford, will you refer to your Exhibit No. 29, please, paragraph 4.

A. Yes, sir.

Q. Under that provision of the tariff, is your line currently applying export rates on shipments consigned to the United State government and handled over Army
303 Base Piers 1 and 2 for export?

A. I have no doubt they are. That answer is no way concedes the correctness of what may be, but it is on the assurance that you give us.

Q. I understand that. If you will refer to your Exhibit No. 31, does that exhibit show every car which was handled by the Seaboard during the stated period from June 1, 1943 through May 31, 1944, delivered at Army Base Piers 1 and 2, or does it include only certain of such shipments?

A. It includes certain of such shipments.

Q. What is the basis for the inclusion of those?

A. The whole analysis covered all of the cars that moved into the pier of every kind, and then so many of those cars—I gave the figure a while ago—189 of those cars had no designation on them of export or the QMRWE number. The remainder did. So, presumably, the remainder would be export traffic if the assurances contained on there were accurate. So out of all of those export shipments all of them are not subject to shipside rates. This case does not involve any export rates that did not have shipside application, so we were not interested in those. They were eliminated, and this is the remainder.

Q. If I understand correctly you also eliminated in the preparation of this exhibit certain cars containing traffic as to which shipside application tariffs are applicable but you excluded them from your exhibit because the Bill of lading did not carry the O. D. T. block number, is that correct?

304 A. No, sir. This contains all the cars that moved on rates that were subject to shipside application without regard to whether the shipping order had "for export" and the QMRWE number on it.

Q. I see.

A. It is every car or purports to be every car of either of those two kinds that were handled. Of course, it does not include any domestic traffic. That is the kind that did not have any QMRWE number or "for export" on it.

Q. Your exhibit merely shows that during the stated

period your line handled 68 cars of commodities which had the shipside application tariff?

A. That is right.

Q. And the balance of the cars which you actually handled during that period did not have the applicable shipside tariff?

A. That is right.

Q. Will you please refer to your Exhibit No. 32.

A. Well, before you proceed, let me make one correction in the heading which I overlooked making. The word "Coastwise" should appear up there in the heading of the first column. In other words, it should read "Number of Carloads of Coastwise, Export and/or Import Traffic" the pier has accommodated.

Q. Referring to Piers 6 through 10 of the Seaboard which are designated in your exhibit, do you know the last time an ocean-going cargo vessel docked at those piers for either loading or unloading?

305 A. No, except by hearsay from our own people.

Q. You do not actually know?

A. I did not investigate that. It did not seem necessary to support the exhibit.

Q. You do not know whether those piers have sufficient depth of water to carry a modern ocean-going cargo ship or not, do you?

A. I know nothing about the depth of the water. I know that they did handle that traffic during those times, that is all.

Q. As to that you would not say how much of the traffic was coastwise and how much was export?

A. No.

Q. Nor do you know how that traffic was loaded, do you?

A. The mechanical means of loading?

Q. Yes.

A. No, I do not know about that.

Q. You do not know the width of these piers, do you?

A. No.

Q. You do not know what they have in the way of marginal aprons, do you?

A. The width of the marginal aprons?

Q. Yes.

A. No. I think practically all of them have a marginal track.

Q. Those marginal tracks are not on the same level as the pier floor, are they?

A. I do not know about that.

306 Q. They do not have any mechanical hoisting equipment like cranes or derricks, do they?

A. I do not know.

Q. Do you know how old these piers are?

A. I do not know that.

Q. You would not know whether they were designed and constructed to handle export traffic or not, would you?

A. No. I do not know that.

Q. You would not know whether it would have been feasible to load from these Seaboard piers any of the cargo ships which have handled export and import traffic over the Army Base piers for the last two years, would you?

A. I do not know the size of the ships or anything involved, so I would not be able to answer that.

Q. Will you refer to your Exhibit 25, Mr. Wolford. Do you know of your own knowledge with how many of the terminal operators at Norfolk this standard form of agreement with the Seaboard is now actually signed and in effect?

A. I have that information in my files, but at the moment I do not have it available.

Q. You can not tell us?

A. Not at the moment. I can probably give it to you later in the day.

Q. For instance, you do not actually know whether you have this standard form of agreement signed and in

307 effect with Lincoln Tidewater Terminals, do you?

A. No. We do not have. I started to say I think the history I gave so stated. I am not sure whether it does or not.

Q. Of course, we have agreed that your statements are not evidence of those facts.

A. Oh, we did not agree to any such thing as that. If I said we had a contract with Lincoln Tidewater Terminals that has nothing to do with the operation of the Lincoln Tidewater Terminals.

Q. Do you actually know whether you have this standard form of contract now in effect with Lincoln Tidewater?

A. I can give you the names of the ones we do have and do not have later in the day and I will answer this way now: I am sure we do not have with Lincoln Tidewater Terminal and I think the history I gave so states that and explains why.

Q. Do you know whether or not you had a standard form of agreement in effect with Transport Trading and Terminal?

A. Whether we did have?
Q. Yes.
A. My recollection is we did?
Q. Are you certain of that?
A. No. I will have to look at the file to refresh my recollection. The history probably states the answer to that question too.

Q. If you will refer to the underscored provisions
308 in lines 44 and 45 on page 1 of this exhibit which provides that the provisions for absorbing the charges shall not apply to traffic that is the property of the terminal, no such comparable provision is contained in any of your tariffs, is there?

A. I do not believe so.
Q. At Lambert Point docks are you paying the operator of the terminal of those docks? Are you paying the tariff provisions for wharfage and handling on applicable shipments?
A. On commercial traffic?
Q. Yes, at the Lambert Point docks.
A. For any commercial traffic, yes.
Mr. Reynolds. For any commercial traffic. Go ahead and complete the answer.
The Witness. We would be making the allowance if they were handling any commercial traffic to the extent they are handling commercial traffic for us.
Q. (By Mr. MacGuineas). If there is any such traffic over Lambert Point docks your line is paying the allowance to the terminal operator, is that a correct statement?
A. That is correct. Exhibit 28 shows we have a contract with them and we are making the allowance.
Q. I beg your pardon?
A. Exhibit 28 shows we have a contract with them and we are making the allowance.

Q. Well, now, with respect to commercial traffic
309 which moves over Army Base Piers 1 and 2 at the present time, are you making any terminal allowance there for wharfage and handling?

A. I do not know of any that we have handled where the Seaboard performed the line haul service. As a matter of fact, I do not know that you had ever handled any until I heard General Kilpatrick testify.
Q. So you do not know what the policy of your line would be with respect to the payment of such charges if you handled such traffic?

A. We have never been faced with the problem of formulating a policy in that regard.

Mr. MacGuineas. That is all.

Mr. Reynolds. Mr. Examiner, I renew the request that Exhibits 23 to 32, inclusive, be received in evidence.

Mr. MacGuineas. Subject to the qualification which the witness has stated, I have no objection to them.

Exam. Disque. They will be received.

(Defendants' Exhibits 23 to 32, Witness Wolford, received in evidence.)

(Witness excused.)

Charles F. Theobold, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. Reynolds). What is your position with the Atlantic Coast Line Railroad?

310 A. Assistant to the general freight agent.

Q. Yesterday, Major Heimbaugh testified that the Atlantic Coast Line paid the Lincoln Tidewater Terminal $544.68 in May, 1943, for wharfage and handling. Will you please explain that payment?

A. Yes. We have received a number of bills from Lincoln Tidewater Terminals which were rendered on the theory—

Mr. MacGuineas. Will you qualify this witness first as to this transaction?

Q. (By Mr. Reynolds). Did you investigate to find out the circumstances surrounding the payment by your company of the $544.68?

A. Yes, sir, I did.

Q. Will you please explain those circumstances?

A. Yes.

Mr. MacGuineas. May I ask how you conducted that investigation?

The Witness. By going to our freight office here and examining the records and getting the bills. I should state here in the case of payments to Lincoln Tidewater I have the receipted bills. In the case of bills which they have rendered but which we have not paid I have their bills which have never been marked "paid."

After a great deal of search we found that we had paid four bills of the Lincoln Tidewater Terminal and

311 four only. In each case the bills covered shipments either to the terminal operated by Lincoln Tidewater Terminals or from their terminal on rates which did not apply to or from shipside and the amount of the wharfage

and handling charges had been collected from the shipper or consignee. The payment of those amounts to the Lincoln Tidewater Terminal, therefore, was not payment of money of the Atlantic Coast Line Railroad but merely of money that had been advanced to the Atlantic Coast Line Railroad.

Q. (By Mr. REYNOLDS). Go into more detail in your explanation of the payment of the $544.68. First, what did the payment consist of?

A. It consisted of 55 carloads of leaf tobacco.

Q. Were the shipments made collect or prepaid?

A. They were prepaid by the shipper.

Q. Did the amount prepaid include the wharfage and handling in addition to the line haul?

A. Yes, sir.

Mr. MACGUINEAS. Will you read what your freight bill says.

The WITNESS. This is not the freight bill. This is bill of the Lincoln Tidewater Terminal.

Q. (By Mr. MACGUINEAS). How did you determine that the shipper had prepaid?

A. From the car number and the other records that are kept at the freight office.

Q. What records?

A. The records of freight handled. On every car
312 that is handled into Norfolk by the Atlantic Coast Line we have copies of the freight bills.

Q. Did you look at these freight bills?

A. I did not look at the individual freight bills, no. I had them down at the freight office. I had that information gathered for me.

Q. All I am concerned with is finding out how you were sure these shippers prepaid the handling charges. That is what I am trying to find out.

A. That information was obtained from the freight bills, copies of which are on file at the local office of the Atlantic Coast Line here in Norfolk.

Q. (By Mr. REYNOLDS). You did not get it yourself, but you had it done?

A. I had it done, yes, sir.

Q. The Atlantic Coast Line having received money for wharfage and handling turned the money over to the Lincoln Tidewater?

A. That is correct, yes, sir.

Q. Were there other payments that you made under similar circumstances?

A. Under similar circumstances, yes.

Q. That is to say, the wharfage and handling charges were either included in the amount prepaid or they were billed?

A. As advances.

Q. As advances?

313 A. Yes, sir.

Q. Does the Atlantic Coast Line Railroad have contracts with shippers and receivers of freight who own their own piers?

A. We have a contract with the Imperial Tobacco Company here that own their own piers.

Q. We will refer specifically to the contract of the Imperial Tobacco Company. You have that here with you?

A. Yes, sir.

Mr. REYNOLDS. May that be identified as Exhibit No. 33?

(Defendants' Exhibit 33, Witness Theobold, marked for Identification.)

Q. (By Mr. REYNOLDS). What does that contract provide with respect to wharfage and handling charges on traffic owned by the Imperial Tobacco Company?

A. That the allowance for wharfage and handling shall not be made on property of the Imperial Tobacco Company.

Q. Is that same provision carried in other contracts that you have with persons who own their own piers?

A. Or operate piers, yes, sir.

Q. With persons who either own or operate piers?

A. Yes, sir.

Q. Have you made a check of the traffic which moved via the Atlantic Coast Line during the twelve months' period and was consigned to Army Base Piers 1 and 2?

A. Yes, sir.

Q. What does this check show with respect to

314 whether or not the traffic moved under shipside rates?

A. We were unable to find a single instance in the 12-month period where we handled a car of freight to the Army Base pier in Norfolk on a shipside rate.

Mr. REYNOLDS. I will state to counsel on the other side that we have an exhibit showing each individual shipment and the rate and charge for moving, but in view of the objection made yesterday on the ground of security, I have not asked the witness to offer any evidence on that exhibit.

Mr. MACGUINEAS. I appreciate your position and that is quite agreeable.

Mr. Reynolds. If you want to inspect it, it is here.

Q. (By Mr. Reynolds). Approximately how many of those shipments moving in the 12-month period had no symbols?

A. No symbol with respect to the possibility it might be export freight?

Q. Yes.

A. Do you want me to give you the number of cars or just the percentage?

Q. Just the percentage.

A. 43 per cent of the cars we brought into the Army Base during that 12-months' period bore no sign of any kind of an export character.

Q. Does the Atlantic Coast Line Railroad Tariff No. B-3068, which is referred to in the complaint, pro-
315 vide that your company will absorb the wharfage and handling charges on export traffic at Norfolk, Virginia?

A. It does not.

Mr. Reynolds. That is all I have. I ask that Exhibit 33 be received and I may also state to counsel that we have the original of this contract.

Mr. MacGuineas. No objection.

Exam. Disque. Received.

(Defendants' Exhibit 33, Witness Theobold, received in evidence.)

Cross Examination.

Q. (By Mr. MacGuineas). Mr. Theobold, you stated that all of the shipments which were examined under your supervision consisted of commodities as to which there is no applicable shipside export rate; is that correct?

A. As to which the applicable rate did not apply to shipside, that is correct.

Q. In other words, in your tariffs it is only by specific designation by commodity that the shipside rate is applicable?

A. Not by commodity, but by some provision in the tariff.

Q. When you stated that 43 per cent of the freight bills contained no reference to export, those were freight bills on shipments as to which the shipside rate was not applicable, is that correct?

A. Let me answer the question in this way: We examined the tariff rates on all of the shipments handled in the
316 12-month period with the possible exception of some cars that had such a tremendous mixture of freight

in it, a few pounds of this and a few pounds of that—we examined the tariffs on all of the shipments, and with the exception I just stated, I could not find any shipside rate that applied to any of those shipments whether in the 43 per cent or not.

Q. Who made the examination of the bills of lading to determine whether they contained any reference to export?

A. I did not examine the bills of lading.

Q. Well, what documents did you examine to determine whether provision for export was noted?

A. The freight bills on file in the office of the Atlantic Coast Line.

Q. Just the freight bills?

A. Yes, sir.

Q. Is it correct to say that the copies of the freight bills which you examined were your carriers retained copies and not the copies which you transmit to the Army for payment?

A. Of course, we could not examine the copies that the Army had. They were carbon copies, exact copies.

Q. So that, of course, you have no means of knowing whether the export certification was or was not stamped on the copies of those freight bills which go through for payment, have you?

A. No, sir, we do not have that.

Q. With reference to the payment which your line
317 made to the Lincoln Tidewater Terminals, you said, I believe, that your freight bills show that the shipper had either prepaid the handling charge or that you had paid it as an advance to him?

A. Yes, sir.

Q. In what form was that designation made on the freight bill?

A. The freight bills on the shipments to the base—I mean to the terminal, that is, shipments that would be exported, carried the word "prepaid" in a column for that purpose on the freight bills. The few cars that were handled from the terminal and were apparently imported, the amount of the wharfage charges were shown in a separate column labeled "advances."

Q. Well, now, referring to the export shipments, that is to say, the shipments which your line carried to the terminal, do you know how the freight bills designated the prepayment? What did it show?

A. I just said the word "prepaid" appears in typewritten language on the space for that purpose.

Q. How was the amount of the bill shown, just a lump sum, so many dollars?

A. It shows the number of bales or hogsheads or whatever it was and the rate, and the rate times the number of pounds. The weight was shown and the rate, plus the number of pounds, and the total charges, and then in a separate column the word "prepaid". Otherwise our agent would have been obliged to go out and collect the freight charges.

318 Q. I do not understand how you can determine, if that is all the freight bill said, that the prepayment related to anything more than the tariff rate?

A. The freight bill also had the usual endorsement so much wharfage and handling, that was added to the total of the freight charges for a grand total of the bill.

Q. Did you observe that yourself?

A. No. I had that done for me by the local office.

Mr. REYNOLDS. It was done while you were up here listening at this hearing?

The WITNESS. Well, when yesterday it was said that the Atlantic Coast Line paid 500 some odd dollars, I was rather surprised, because I did not know we had paid them any such amount of money; so we immediately set to work to check up on it.

Q. (By Mr. MACGUINEAS). How do you know what these freight bills actually did state? You did not see them.

A. I did not see them, but we have competent employees at the local freight office to do work like that.

Q. And they just told you verbally what was on the freight bill?

A. That is correct.

Q. Did that person specifically tell you that the prepaid bill listed separately wharfage and handling?

A. I can not say that he did. I can give you the

319 exact language in which he gave me the information.

Mr. MACGUINEAS. That is all.

Re-direct Examination.

Q. (By Mr. REYNOLDS). With respect to 43 per cent of the shipments that did not contain on the freight bill any indication that they were for export, if I understand you correctly 57 per cent of the shipments did contain such indication?

A. They contained some hint in a small part of them, the 57 per cent, the words "for export" were shown on the bill, and, conversely, on a portion of the 43 per cent the word—

"not for export" or some declaration was shown on the freight bill.

Mr. Reynolds. That is all.

(Witness excused.)

Mr. Cousins. May I ask Major Heimbaugh a question?

Hays M. Heimbaugh, recalled, having previously been sworn, testified further as follows:

Direct Examination.

Q. (By Mr. Cousins). Major Heimbaugh, this morning when you testified to an export certification on certain bills of lading, did you mean to say that that was a stamp put on there by some Army officer and the document was then turned over to the government pay agency but that that was never furnished to the railroad in any way?

320 A. This provision in the tariff, you recall, about shipments moving over Army bases says that the export rate shall apply in such instances. It says: "Upon evidence of proper certification."

Q. Yes.

A. This stamp endorsement that you see on this bill is an endorsement that the transportation officer puts on those bills so that the finance officer in Washington and the general accounting office later in the audit will know upon what basis they should make final settlement. Whether or not the carriers present a copy of the freight bills to the transportation officer for his endorsement with respect to importation, whether they do that at any time or in all cases or only part of the time, I have no knowledge, but as to the bills that go through for payment that endorsement is made when it is proper.

Q. All you will say then is that that stamp is presented to the government paying office as evidence to him, but you have not said it is presented to the railroad as evidence to them. Is that so?

A. In effect, that is correct. So far as I know, if you will give us a copy of the freight bill and ask us to have it stamped, we would stamp it. I can only comment respecting the freight bills that have gone through channels at Washington that I was able to obtain.

Mr. Cousins. That is all.

(Witness excused.)

321 Carl W. Dilli, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. Dixon). What is your connection with the Southern Railway System, Mr. Dilli?

A. I am assistant to the freight traffic manager.

Q. Your headquarters are at Washington, D. C.?

A. That is correct.

Q. Will you give a brief outline of your railroad experience, Mr. Dilli?

A. I have been employed by the Southern Railway for the past 25 years, the principal part of that time in the traffic department in the handling of freight rates and other matters pertaining thereto.

Q. Have you studied the issues involved in this complaint?

A. I have.

Q. Yesterday did you hear testimony to the effect that the Southern Railway had paid to Lincoln Tidewater Terminals the sum of $3,000 in 1942?

A. I did.

Q. Have you looked into that transaction?

A. I have.

Q. What investigation have you made?

A. The investigation that I made develops that there was a movement of or through the Lincoln Tidewater
322 Terminals, to a point in Alabama, consigned to the Reynolds Corporation at that point. The rate does not apply to shipside. In other words, it is subject to the wharfage, but no handling. We collected the charges from the consignee down there in Alabama and made payment of such charges as collected to the Lincoln Tidewater Company.

Q. Those are the wharfage charges?

A. Yes, sir, the wharfage charges.

Q. Will you please state what ports the Southern Railway serves?

A. Do you want all of them?

Q. Beginning at Norfolk.

A. Norfolk, Charleston, Savannah, Brunswick, Jacksonville, Mobile and New Orleans.

Q. Does the Southern make any allowance for wharfage and handling on freight moving under shipside rate to those ports where freight is owned by the operator of the facility?

A. None whatsoever.

Q. You have prepared an exhibit to be introduced in this proceeding?

A. I have.

Mr. Dixon. May we have that identified as Exhibit No. 34?

(Defendants' Exhibit 34, Witness Dilli, marked for Identification.)

323 Q. (By Mr. Dixon). Before taking up your exhibit, will you briefly tell us what is the general practice of the Southern Railway in particular and the Southern lines in general in establishing rates on import and export traffic to and from southern ports?

A. At page 8 of the complaint, it is alleged "No adjustment was made in the line haul rates applicable to and from Norfolk, Virginia, at the time when the control and operation of the facilities of Transport, Trading and Terminal Corporation were assumed by the War Department on June 15, 1942, nor has any adjustment since been made."

In establishing rates on export or import traffic to or from points in Southern Territory to or from Virginia and South Atlantic ports, it is the practice of the Southern carriers to publish the rates subject to the addition of wharfage and handling charges. In other words, the rates are not published to include the wharfage and handling charges. There are instances, however, where we publish rates that do include these charges, but that is the exception rather than the rule. Another exception is that from Ohio River Crossings, we have established rates which include the wharfage and handling charges to enable us to compete with the port of Baltimore. The rates from the competitive territory are made the same as to Baltimore because the rates to that port include the wharfage and handling charges.

324 At page 608 of the report of the Commission in I. C. C. Docket 12681, involving charges for wharfage, handling and storage and other accessorial services at Atlantic & Gulf ports, reported at 157 I. C. C. 663, the Commission referred to the fact that "The method of publishing the rates at South Atlantic ports is generally different from that at North Atlantic ports as the port charges are published separately from the line haul rates. Agency traffic in which the rail carriers serving these carriers generally concur, contain separate charges for storage, handling and wharfage and other port charges which apply on most of the traffic between Southeastern Territory and these ports."

I believe it well at this point before taking up the detailed discussion of the movement and the rates applicable thereon to point to the fact that, in a number of cases the most recent one being reported at 243 I. C. C. 525, page 536,

the Commission has said: "Moreover, we have frequently said in effect that there is nothing inherent in coastwise or foreign traffic which entitles it to rates lower than those applied to domestic traffic."

Q. Is what you have said generally true with respect to the rate to and from the Gulf ports?

A. That is true.

Q. As well as Virginia and South Atlantic?

A. That would cover in general the ports extending from Norfolk around to New Orleans.

325 Q. Where you referred to the exception covering the rates applying from the Ohio River Crossings, those rates being on a competitive basis with Baltimore, would that apply also from origins north of the Ohio River?

A. That is true, yes, sir.

Q. Now, Mr. Dilli, let us take page 1 of the exhibit and discuss it.

A. This page shows the number of cars of what we have to assume to be both domestic and export traffic moving to Norfolk for subsequent transfer to Army Base 1 and 2. It shows the symbol and the name of the consignee as represented by the symbol.

I want to explain here that this movement was taken from our switching tickets. At the time we made the investigation at Norfolk we had to depend on the switching tickets to take off the movement because of manpower and lack of sufficient time to prepare the data for the case that was set a few weeks back. The record on the switching tickets was taken from the transportation papers, and if the transportation papers showed that there was a symbol QMRWE, we assumed that traffic to be export traffic. If it did not contain that symbol, we did not assume it to be export traffic but, rather, domestic traffic. In that respect I may say our examination showed there was a great volume of commodities known as pallets and a very substantial movement of lumber. In the case of the lumber

326 there were quite a number of shipments that moved on straight bills which had reference to the fact that government bill of lading would subsequently be substituted for the straight bill of lading. In respect to the pallets, it is hard to describe that. It is a native wood. They have three or four pieces in one direction and I understand they are used to put in the hold of a ship before the cargo is placed on and in some instances are used to fill in ends. That is the information we developed.

Q. Can you tell from page 1 of this exhibit how many of these shipments moved on shipside rates and how many did not?

A. No, I can not. In a subsequent exhibit I will be able to show you that, but not on this page.

Q. Is that all you have to say on that page?

A. Yes, sir.

Q. Let us turn to page 2.

A. Page 2 consists of excerpts from Southern Railway port charges tariff, showing Item 80-A, Item 85. Item A at the top is a reissue of Item 80. The reissue took place in supplement issued July 6, 1944, whereby we cancelled out from the tariff the Transport Trading and Terminal Company.

Q. Right at that point, Exhibit No. 4, page 32, shows that the Transport Trading and Terminal Corporation is still included in Item 80 of the tariff, does it not?

A. Yes, sir.

Q. Have you examined the exhibit?

A. Yes, I have examined it. It does show that, that reference to Item 80, whereas my exhibit refers to Item 80-A.

327 Q. Exhibit 4 is incorrect?

A. It is incorrect in that it does show that the Transport Trading and Terminal Company is still in the tariff, whereas they were cancelled out effective July 6.

Q. Why were they not cancelled before July 6?

A. We formerly had an agreement with Transport Trading and Terminal Company. That agreement by mutual consent of parties was terminated on July 15, 1942.

Q. Are you testifying of your own knowledge now?

A. Yes, sir. I have examined all these agreements. I may say that the Southern Railway makes the agreements and they are joint agreements in most every instance between all of the Southern lines serving Norfolk. We prepare the exhibit in the main. It is submitted to the other carriers for their signature as well as the signature of the wharfage or terminal companies. We have the records on file in our Washington office. The agreement with the Transport Trading and Terminal Company was terminated on July 15, 1944 (1942). For some unaccountable reason it continued in the tariff. When I started my investigation of this complaint I run into it and we cancelled it out.

Q. I notice on page 32 of Exhibit 4, Item 80, as well as

page 2 of your Exhibit Item 80-A, show the Southgate Terminals. Are they still in business?

A. I do not understand that they are. I am advised that they are not in business.

328 Q. So that they should come out of the tariff, too?

A. Yes.

Q. Go ahead.

A. I probably should go on and explain that the Lincoln Tidewater Terminal is shown in Item A and Item A is primarily for switching.

Q. You mean 80-A?

A. Yes. Item 85 covers the terminals which we would switch or lighterage.

Q. The first concern in Item 85 is the Imperial Tobacco Company, Berkley Terminals?

A. Yes, sir.

Q. We have had some testimony about that before. Will you explain the arrangement between the Imperial Tobacco Company and the Southern Railway?

A. Yes. With the exception of Imperial Tobacco Company none of the terminal companies so far as our investigation develops have any traffic that is owned by the terminal company. Should there be any such traffic, no allowances would be made for the obvious reason that we have no tariff provisions to that effect.

Imperial Tobacco Company is in the same category as the government operation at Army Base Piers 1 and 2, in that it handles traffic of which it is the owner, such as tobacco, staves and perhaps other tobacco acces-

329 sories. Our agreement with Imperial provides that no allowance will be made to the terminal for the handling of its own traffic. We have made no allowances on such traffic. We have made no allowances to any terminal company including the government on traffic owned by the terminal and moving over the terminal.

Q. Have you anything further to say about page 2?

A. I have not.

Q. Page 3 seems to quote an item from Agent Hoke's I. C. C. No. 712. I believe Major Heimbaugh quoted the same item in one of his exhibits. We can just skip that.

A. Yes.

Q. What have you to say about page 4?

A. Page 4 shows the rates to Norfolk and the distances from representative southern points and the all-rail and rail-water rates to Baltimore. The purpose of the exhibit is to show that in accordance with the provisions of Item

130 of Hoke's Georgia Tariff, as shown in the previous page, in instances where the rate to Norfolk plus wharfage handling charge would be greater than the rail and water rate to Baltimore on export traffic the Baltimore rate would apply.

That situation was brought about by reason of departures under the Fourth Section. In other words, where the Commission prescribed the rates to Norfolk in Docket 13494, as subsequently advanced, it was found that the rates to Norfolk were higher when you added to them
330 the wharfage and handling charge than the rates to Baltimore. So to clear up the departure under Section 4, the Commission required us to observe the Baltimore rates as maximum.

Q. Turn to page 5 and tell us about that.

A. Do you want me to go ahead?

Q. Yes, go ahead.

A. Page 5 shows a representative number of cars, 163. We show the origin and destination, of course, being Norfolk, the commodity and the rates applicable thereon. We show what rate it did move on, that is, under the domestic column, and the classification; then we show that the export rate in every instance on this exhibit is the Baltimore rate as maximum. As previously explained, that was brought about by reason of the fact that if you added the domestic and the wharfage handling rate it exceeded the Baltimore rate.

Q. These cars, as I understand it, moved under shipside rates?

A. Yes, sir, under the Baltimore rail-water shipside rates. In the column marked "Remarks" we have shown that in the case of the rates opposite lines 1 to 7 the class rates have been applied and those class rates were prescribed by the Commission in Docket 13494.

Q. Take up line 1 on automobiles. It shows one car. Tell us how you read that.

A. The domestic rate to Norfolk would be 189 as shown on page 4. Then we show what the actual rate assessed was, 189.

331 It happens in that instance that the export rate is the same as the domestic rate. But if you add to the 189 the wharfage handling charge you would get something higher than 189. By reason of that you must apply the rates shown under Baltimore as maximum, which is the Baltimore rail and water rate.

Q. In other words, on that shipment the export rate of

189. has a little asterisk beside it. That is the Baltimore rate?

A. That is correct. That is shown by the asterisk.

Q. Go ahead.

A. So there will not be any question about it, we show what the Baltimore rate is in the last column of rates.

Q. Proceed.

A. As I was about to say, opposite lines 8 to 12 we show certain rates. They moved on column ratings. Under "Remarks" we show the ratings or columns that have been approved or prescribed by the Interstate Commerce Commission.

The purpose of that exhibit is to show that the rates at best are not in excess of maximum reasonable rates. What is true in respect to the lines I have already referred to is true in respect to the lower part of the exhibit.

Q. Let us turn to page 6. That seems to be an excerpt from Agent Hoke's Southern Export Tariff No. 705-F. I do not believe any explanation is necessary.

A. That has already been explained and I do not think you need to refer to it further.

332 Q. Refer to page 7 and tell us what that is.

A. Page 7 is statement of the number of cars that moved to Norfolk under specific export rates. I do want to call attention to the fact that the export rates on cigarettes and tobacco, as indicated by the symbol M are truck competitive rates, which obviously are depressed. That can be very readily verified by the fact that the domestic rate to both Baltimore and Norfolk is 55 cents per 100 pounds.

Q. Do you have anything further you wish to say?

A. I think not.

Mr. Dixon. Mr. Examiner, we offer in evidence Exhibit No. 34.

Exam. Disque. It will be received.

(Defendants' Exhibit 34, Witness Dilli, received in evidence.)

Cross-Examination.

Q. (By Mr. MacGuineas). Mr. Dilli, in your opinion, under your tariff which calls for shipside delivery, what do you consider your obligation to be to effectuate shipside delivery?

A. Well, on traffic that would not be owned by the operator of the freight, it would be our obligation to put it alongside the ship.

Q. In other words, general shipside delivery under your tariffs means for the carrier to unload the car and put the traffic alongside the ship's berth; is that correct?

A. I think that is correct, on traffic that is not the
333 property of the wharfers.

Q. Do your tariffs contain that qualification about property not belonging to the man operating the wharf?

A. No, but our agreements do. Our tariffs would not have to contain that.

Q. Your tariffs do not contain any such language?

A. No.

Q. You have not given the shippers notice of that qualification, have you?

A. No, not in the light it is not included in the tariff.

Q. Let me put one more question along that same line. At the Army Base Piers now you are not unloading the cars for export, are you?

A. No.

Q. As to those shipments which move under shipside rates, do you consider you are making shipside delivery?

A. We are applying a shipside rate.

Q. Do you consider you are making shipside delivery?

A. We cannot make shipside delivery.

Q. You are not doing it?

A. No.

Q. You testified earlier about the circumstances under which you made payment to the Lincoln Tidewater Terminals of $3,206, is that correct?

A. I did not specify the exact amount. I did not
334 know the exact amount until you mentioned it yesterday.

Q. That is the amount to which Major Heimbaugh testified. That is the one you examined?

A. Yes, sir.

Q. Did you conduct any examination of the circumstances of any other payment which the Southern may have made to Lincoln Tidewater Terminals?

A. I do not know of any others.

Q. You are not sure whether any others have been made?

A. I would not know unless I went into a great detailed examination and examined our files in the Washington office, and I do not have them with me. Either that, or make an investigation to our local representatives. I have talked with them about it. He does not tell me of any others he knows of.

Q. Do I gather that in the preparation of your exhibit where you list a car as domestic you have assumed that shipment to be domestic because the bill of lading did not contain the O. D. T. block number?

A. That is one of the assumptions of the principal ones, but in the case of pallets I understand that is used, as I explained, in the bottom of ships. That is dunnage. It would not be export traffic and a very substantial movement of that incidentally. On those shipments or the records from which we took our movements did not contain the QMRWE symbol.

335 Q. Will you refer to page 1 of your exhibit, please? You list in there Southern Railway traffic delivered to the government. Delivered where?

A. Well, the heading, of course, in just incidental. That would be traffic that we delivered to the Belt Line for delivery to the Army Base.

Q. That is all you know about that?

A. That is correct. The switching ticket showed to whom it was consigned in the Army Base.

Q. I understand that. I assume then from your previous answer that we have no way of knowing how much of this traffic, if any, ever passed over Army Base Piers 1 and 2?

A. No. We do not know. We do not know what transpires over there. All we know is that this is traffic that reached Norfolk by the Southern Railway, subsequently delivered to the Belt Line for delivery to the Base, and that the tickets from which we made the record carried symbols as shown on the page. We have not been able to determine from those symbols the government agency to whom it was consigned.

Q. Well, since there is no way of demonstrating how much of this traffic passed over Army Base Piers 1 and 2, I am somewhat at a loss to understand the relevance of the exhibit. Can you explain that?

A. We thought it important in every case to show the volume of movement.

336 Q. As long as you understand that it does not necessarily show the volume of movement of traffic over Army Base Piers 1 and 2.

A. I do not know what becomes of it after it leaves the possession of the railroads.

Q. You referred to the provisions of your contract with the Imperial Tobacco Company to the effect that allowances would not be paid on tobacco owned by that company.

A. Under no circumstances. We make no payment to Imperial or any other terminal company.

Q. Your tariffs do not say anything about that, do they?

A. They do not have to. The tariffs do not have to say you will not do a thing. It has to say what you will do.

Q. It does not say anything about that?

A. No, it does not.

Mr. MacGuineas. That is all.

(Witness excused.)

C. H. Ware was sworn and testified as follows:

Direct Examination.

The Witness. My name is C. H. Ware. I am traffic manager of the Norfolk Southern Railway Company and I have been connected with the traffic department of the Norfolk Southern for approximately 23 years. I have held
337 the position of rate clerk, chief clerk in the general freight office, assistant general freight agent, general freight agent, and my present position as traffic manager. I think I am familiar with this proceeding.

With respect to allowance to the Lincoln Tidewater Terminals a check was made of our records which indicate that in February and March, 1943, the Norfolk Southern paid in the form of wharfage and handling charges to Lincoln Tidewater Company $1,057.99. All except $160.32 of that amount was paid on leaf tobacco which moved to Norfolk on a domestic rate. The wharfage and handling charges were in addition and the wharfage and handling charges and the line haul charges were prepaid. There was $160.32 paid on carload shipments of steel bars, which represented wharfage only. The charges on these shipments were also prepaid and the wharfage charge was prepaid.

I have made a check of our records for the period June 1, 1943 to May 31, 1944, to determine the number of carload shipments which the Norfolk Southern has handled to Norfolk and delivered to the Army Base at Norfolk through the Norfolk-Portsmouth Belt Line during that period of time. I have a statement in detail giving the total number of cars but I will not submit it if the complainant would rather me just refer to it as several hundred cars as the total.

Mr. MacGuineas. That is adequate for our purposes, if you are satisfied.

The Witness. There were several hundred cars.
338 Of that number there were only 12 cars that were subject to the Baltimore rate held as maximum at Norfolk. There were six additional cars of that moving to

Norfolk on a specific shipside rate, which is a depressed truck competitive rate. In other words, the normal domestic rate is 55 cents per hundred pounds and the specific shipside depressed rate is 39 cents per hundred pounds.

Out of the several hundred cars which moved only 62 per cent of the total did not show a symbol to indicate that they were export traffic. As to whether the cars were actually exported or not, I do not know, but they were not subject to shipside rates. In other words, I have stated in specific numbers the cars that were subject to the Baltimore rate as maximum, which is the shipside rate, and the specific rate on six additional cars.

Q. (By Mr. MacGuineas). Can you tell us at this point what the symbols you have in mind?

A. The symbol I had in mind was QMRWE. That is all I have to offer.

Q. (By Mr. Winn). In referring to the $100 payment which you made, I do not know that you made it clear on the record whether that $100 represented a sum which was a charge for wharfage and handling in addition to the line haul rate. You said it was prepaid.

A. Yes. It was a charge of $160.32 and that was
339 in addition to the line haul rate.

Q. I knew you wanted to make that clear on the record.

A. Yes. I thank you.

Cross Examination.

Q. (By Mr. MacGuineas). You referred to several hundred cars during this period as delivered to the Army Base. Will you explain what that means?

A. That means that we delivered the cars to the Norfolk-Portsmouth Belt Line Railroad and they carried the cars to the property and delivered them on the Army Base property upon instructions from the officers or the yard masters in charge of the Army base.

Q. Of course, you have no way of knowing how much, if any, of that traffic went over the Army Base Piers 1 and 2 we are concerned with here, have you?

A. No, sir, I have not any way of knowing that.

One other thing I would like to say. We do not make an allowance in any case to the owner of property. We have a contract with the Imperial Tobacco Company which is similar to that of the other southern carriers specifically providing that allowance will not be made on the Imperial Tobacco Company's own freight.

Q. In that connection, Mr. Ware, do your tariffs name the Imperial Tobacco Company as a terminal at which you will absorb?

A. Yes, our tariff names in all cases the terminal
340 at which we will absorb.

Q. And pay allowances?

A. Yes, sir.

Q. And the tariff itself does not make that qualification which you have stated as to ownership of the property?

A. No. That is covered by contract with the terminal company.

Q. Did you in your investigation run across a shipment of ore over your line from El Paso, Texas, in December of 1943—

A. It is the reverse of that.

Q. It is the reverse, from the terminal to El Paso, Texas.

A. Well, in my investigation I was merely investigating those allowances made to the Tidewater Terminal. I am familiar with the shipment you have reference to, a movement of 6,000 or more tons that moved through the Army Base at the request of Captain J. R. Bull, who comes under the command of General Kilpatrick. We billed it at 1 cent wharfage, with a wharfage charge of 1 cent per hundred pounds. The charge was collected at destination from the consignee and turned over to the Army Base.

Q. Well, was that not a shipside application rate?

A. No, sir.

Q. It was not?

A. No, sir. It does not include that. I think the rate from Baltimore was a shipside rate, but it would not apply on this particular shipment. On these particular shipments
the Baltimore rate was not actually applicable at the
341 time the shipment moved from Norfolk via the route it moved. The Baltimore rate included wharfage only and not handling.

Mr. MacGuineas. That is all.

(Witness excused.)

S. H. Williams, was sworn and testified as follows:

Direct Examination:

The Witness. My name is Samuel H. Williams. I am director of the Transportation Bureau, Chamber of Commerce and Board of Trade of Philadelphia. That organization was created for the purpose of promoting and advancing the commerce, business, and manufacturing interests of the city and port of Philadelphia.

The port of Philadelphia is in competition with each of the North Atlantic ports, including Norfolk, as well as all of the Atlantic and Gulf ports.

Our position in this case is substantially the same as that stated by Mr. Laux of the Port of New York Authority, and Mr. Seal for the Baltimore Association of Commerce. I do have further evidence, an exhibit or two exhibits, which I wish to present and they may be duplication to an extent of the evidence that is already in the record in Mr. Hodkinson's Exhibit No. 8. It does present a somewhat different picture, however.

I offer for identification Exhibit No. 35, consisting of 14 pages, which is a comparison of the short line mileage distances and present domestic export, import, inter-
342 coastal and coastwise first and fifth class rates between Philadelphia and Norfolk, on the one hand, and 105 Central Freight Association Territory key points on the other.

I also offer for identification a map, as Exhibit No. 36.

(Intervener's Exhibits 35 and 36, Witness Williams, marked for identification.)

The Witness. The colored area in Exhibit 36 is the interior origin and destination territory of Exhibit No. 35. You will please insert the No. 35 at the lower right hand corner of that exhibit so it will read: "for rates see Exhibit No. 35."

The points in this exhibit are identically the same as those in Exhibit 8 except Parkersburg, and West Virginia, are not included in my exhibit. Classes 1 and 5 are representative of all classes and the difference in the first class as shown in the exhibit correspond to the existing tariff differences on first and second classes, whereas the fifth class differences correspond with the differences on classes third and lower.

Section 1 of the exhibit, pages 1 to 12, inclusive, covers the territory colored yellow on map Exhibit No. 36 and Section 2, pages 12 and 13, cover the territory on the map colored in blue. By reference to page 14 of Exhibit No. 35, it will be noted that the average short line distance between 94 points in section 2 and Philadelphia is
343 779.9 miles, whereas the Norfolk average distance is 86.1 miles greater or 866. It will also be noted that these differences are reflected in the average domestic rates, the average rates being lower with respect to Philadelphia, whereas on the ports rates or export, import, coastwise and

intercoastal rates, the differences are 1 cent on eastbound and 2 cents on first class and 1 cent on fifth class on westbound less with respect to Norfolk and Philadelphia.

Section 2 shows the average situation with respect to the blue territory of 11 points and the latter part of the summary shows the average of the situation as a whole.

That is all I have to offer, Mr. Examiner, except to say that we are opposed to any action here which would result in further advantaging Norfolk in its relationship with Philadelphia in export and import rates.

Q. (By Mr. WINN). Is not that territory shown on your map Exhibit 36 in yellow an important origin and destination territory for export and import traffic?

A. It is. With respect to all of the ports the competition there is very keen.

Q. If the line haul rates to Norfolk were reduced by eliminating the handling and wharfage charges, you would have Norfolk's preference or change in that important area substantially increased?

A. Exactly.

344 Mr. WINN. That is all.

Cross Examination.

Q. (By Mr. MACGUINEAS). You understand that the alternative prayer which we have requested in this case with respect to reducing the line haul rates at Norfolk also has as a part of it the setting up of tariffs which would impose a separate charge for the handling at the port? You appreciate our position on that?

A. I understand that that is the position. I question how the proposition could work out in actual practice for many reasons.

Q. You are not interested in any phase of this case except to oppose that alternative, is that correct?

A. We are opposed to the alternative prayer of the complaint, the proposal of segregation of the terminal from the line haul charges.

Q. Any of the other alternatives which may be prayed for you are not concerned with?

A. I do not recall any other alternatives other than that.

Q. For instance, one of the alternatives is for an order of the Commission to require the carriers to perform the services. You would not be concerned with that, would you?

A. I do not know except the question may arise after the war among the shippers as to whether they should be ac-

corded some of the considerations, but I can not an-
345 ticipate that far ahead. At the moment we take no position with respect to that angle of the case.

Mr. MacGuineas. That is all.

The Witness. I offer my Exhibits 35 and 36 in evidence.

Exam. Disque. They will be received.

(Intervener's Exhibits 35 and 36, Witness Williams, received in evidence.)

(Witness excused.)

Mr. Wagner. Let the record show that the Norfolk Port Traffic Commission, for which I speak, is opposed to the complaint and that portion of the complaint which seeks as an alternative the separation of the line haul and terminal charges on import, export, or any other traffic through Norfolk for the reasons set forth by the Witness Laux and Witness Seal.

Mr. MacGuineas. And again, Mr. Wagner, you are not concerned with the alternative involved?

Mr. Wagner. We are not interested a particle.

Exam. Disque. Does any one else desire to be heard?

Mr. MacGuineas. Mr. Examiner, I have two witnesses in rebuttal and I think they can be handled quite briefly.

John W. Gilius, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. MacGuineas). What is your name and occupation?

A. John W. Gilius. Captain, Transportation Corps.

346 Q. Captain Gilius, you are in the Transportation Corps assigned to the Hampton Roads Port of Embarkation area?

A. I am.

Q. Are you familiar with the mode of operation in connection with the handling of traffic at Army Piers 1 and 2?

A. I am.

Q. Do the carriers have a joint agent stationed at Army Base Piers 1 and 2?

A. They do. His name is Mr. Kimbrough. He maintains an office in the Army Base.

Q. His office is in the building back of the piers, is that correct?

A. It is back in the warehouse area, yes, sir.

Q. Did you bring with you a form of document which it is

the regular practice of the carriers joint agent to furnish the Army with respect to deliveries of cars to the port?

A. I have such a list here. It is used as an arrival notice and it is developed by Mr. Kimbrough or his assistants stationed at the Army Base.

Q. How often do you receive such notice from Mr. Kimbrough?

A. Two or three times during the day, one definitely early in the morning and others as arrivals come in during the day.

Mr. MacGuineas. I regret I have not had an opportunity to make copies of this, so I will not be able to put it in as an exhibit.

347 Mr. Reynolds. May we see it?

Mr. MacGuineas. Certainly.

Q. (By Mr. MacGuineas). Captain Gilius, when one of these forms, which is headed Norfolk-Portsmouth Belt Line Railroad Company, arrival of cars at Transport Trading and Terminal Corporation, is delivered to the transportation officer at the base, how much of it has been filled in?

A. All of the information which appears on the present form has been filled in by the railroad agent, including the rubber stamp "Export" opposite those cars which appear on this sheet.

Q. Then is it correct to say that when the joint agent delivers this daily form to you, it contains on it the following information: the initials of the carrier, the car number, a statement of the contents of the car, the name of the consignee, the initials of the line haul carrier, and either a blank space or in lieu thereof with respect to certain shipments the stamp "Export."

A. That is correct.

Mr. MacGuineas. That is all.

Mr. Reynolds. No questions.

Mr. Cousins. No questions.

(Witness excused.)

James Henry Devereux, Jr., re-called, being previously sworn, testified further as follows.

Direct Examination.

348 Q. (By Mr. MacGuineas). Mr. Devereux, you are the person who testified yesterday?

A. I am.

Q. During the last two years since June 15, 1942, how

frequently have you personally been on the Army Base Piers 1 and 2?

A. I would say an average of three days a week.

Q. When you were on the piers did you ever see a Belt Line engine hauling cars on or off the pier tracks which run down the center of the piers?

A. I have.

Q. How frequently did you observe that occurrence?

A. It would be hard to state, but very frequently. I have been held up trying to cross from one side of the pier to the other due to a shift being made. I can definitely state at least twenty-five times, and probably many more I have seen that engine make such a shift.

Q. Will you explain specifically what you mean by making such a shift?

A. Either pushing into the pier shed a drill of fully loaded cars or pulling out of the pier shed a drill of cars which had been unloaded.

Q. Mr. Devereux, for the period prior to June 15, 1942—first, you testified that you have been engaged in the traffic business in the port since 1922?

349 A. That is correct.

Q. Over that span of years how frequently did you have occasion to actually go upon Army Base Piers 1 and 2?

A. It depended to a large extent on the amount of business which the companies I represented had to move through there. There might have been occasions where a period of two weeks or a month passed without my going down there, and then again I would go down four or five times a week for several weeks in succession. I would say during that previous period, an overall of twenty years, an average would be twice a week at least.

Q. During that earlier period, did you ever observe a Belt Line engine pushing cars or pulling them out from the tracks which run the length of those piers?

A. I have.

Q. And in general how frequently did you observe that occurrence?

A. It is a little difficult to answer that question in a period of twenty odd years, but I have seen that often enough to know that it must have been a common practice down there.

Q. Well, from your observations, was there any difference in the actual operation performed by those Belt Line loco-

motives, in pushing cars on and pulling them off the pier during the earlier period prior to June 15, 1942 and during the subsequent period when the Army Base took over those piers?

A. No difference whatsoever.

350 Mr. MacGuineas. That is all.

Mr. Reynolds. No questions.

Mr. Cousins. No questions.

(Witness excused.)

Exam. Disque. Does any one else desire to be heard?

(No response.)

Exam. Disque. Briefs are desired and briefs will be due on October 1st.

The hearing is closed.

(Whereupon, at 5:05 p. m., July 19, 1944, the hearing was closed.)

351

Exhibit No. 1
Witness: Kilpatrick.
Page No. .....

Interstate Commerce Commission

Docket No. 29117

United States of America, Complainant

v.

Aberdeen and Rockfish Railroad Co., *et. al.*, Defendants

Exhibit

Showing correspondence between the railroads serving Norfolk, Va. and the Army with respect to matters involved in this complaint.

352

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 1

WAR DEPARTMENT
ARMY SERVICE FORCES
Office of the Chief of Transportation
Washington 25, D. C.

In Reply refer to SPTOT 551.2
(Norfolk & Portsmouth Belt
Line Railroad Company)

June 22, 1942.

Mr. W. A. Moore, Tariff Agent,
Norfolk and Portsmouth Belt Line Railroad Company,
Terminal Building,
Main and New Castle Streets,
Norfolk, Virginia.

Dear Sir:

Piers and other facilities at the port of Norfolk, Va. that now are or will be operated by the United States Government include Army Base Piers #1 and #2.

Until June 15, 1942 Pier #1 was leased from the Government by the Transport, Trading and Terminal Co., Norfolk, Va. Regulations governing charges payable to that company are set forth in items 100-A and 900-B, supplement 16 to Norfolk and Portsmouth Belt Line tariff 6-J, I. C. C. 105.

It is respectfully requested that all Government-operated facilities coming within the scope of said tariff be shown in a supplement without delay to the end that interested carriers will be informed of all revenues accruing to the Government.

Please inform this office of action taken.

For The Chief of Traffic Control Division:

Very truly yours,

E. C. R. LASHER,
Lt. Col., Q. M. C.,
Deputy Chief.
24-92500-40

353

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 2

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY
Norfolk, Virginia

June 25, 1942
File: T-R 105-6-42

Mr. G. F. Potter, G. F. A., A. C. L. RR., Wilmington, N. C.
Mr. T. Jefferson, Jr., G. F. A., C&O Rwy., Richmond, Va.
Mr. C. H. Ware, G. F. A., N. S. RR., Norfolk, Va.
Mr. W. A. Huse, A. F. T. M., N&W Rwy., Roanoke, Va.
Mr. R. B. Cooke, G. F. A., Penn RR., Norfolk, Va.
Mr. C. L. Senter, G. F. A., S. A. L. Rwy., Norfolk, Va.
Mr. A. E. Hendee, G. F. A., Sou Rwy., Atlanta, Ga.
Mr. J. F. Smith, G. F. A., Vgn. Rwy., Norfolk, Va.

Gentlemen:

Herewith copy of letter I received from the War Dept., Headquarters, Services of Supply, Office of the Chief of Transportation, Washington, D. C.

The Army Base piers and warehouses which were leased by the U. S. Maritime Commission to the Transport, Trading and Terminal Corp. has been cancelled, and the U. S. Government has taken over as of June 1st. The U. S. Navy has Pier #2 and warehouses and the War Department has Pier #1 and warehouses.

You will note in their letter that they have mentioned items 100-B and 900-B of Supplement No. 23 to Belt Line Tariff 6-J, ICC 105, requesting that we prepare a supplement with their name on the Title Page in lieu of the Transport, Trading and Terminal Corp.

Therefore, will you kindly check into this situation and advise me as to whether or not you are desirous of granting the government's request.

Yours very truly,

s/ H. CUNNINGHAM
Agent

HC:ve
cc Chief of Traffic Control Div.
War Department,
Headquarters Services of Supply
Office of Chief of Transportation
Washington, D. C.
SPTOT 551.2
(Norfolk & Portsmouth Belt
Line Railroad Company)

354

EXHIBIT NO. .....
WITNESS .....
PAGE NO. 3

NORFOLK AND WESTERN RAILWAY COMPANY
TRAFFIC DEPARTMENT

O. W. Cox
General Traffic Manager

85244-A

Roanoke, Virginia—July 3, 1942. w-

Lt. Col. E. C. R. Lasher, Q. M. C.,
Office of Chief of Transportation,
Headquarters Services of Supply,
War Department,
Washington, D. C.

Dear Sir:

A copy has been furnished to me of your letter of June 22nd to Mr. M. A. Moore, Tariff Agent of Norfolk and Portsmouth Belt Line Railroad Company bearing reference SPTOT 551.2, in which you state that the Army Base Piers #1 and #2 at Norfolk, Virginia, heretofore leased to Transport, Trading & Terminal Corporation, are now or will be operated by the United States Government. In that letter you refer to "regulations governing charges payable" to that carrier as set out in items 100-A and 900-B of Supplement 16 to its tariff 6-J, I. C. C. 105, and you request "that all Government-operated facilities coming within the scope of said tariff be shown in a supplement without delay to the end that interested carriers will be informed of all revenues accruing to the Government."

That letter was referred to me because the tariff in question is applicable upon traffic which has moved or is to move in line-haul service over the Norfolk and Western Railway (the Belt Line being only a switching carrier), and also because some modifications may be required in certain tariffs published by the Norfolk and Western.

We also have received certain requests from the former tenant of those properties (Transport, Trading & Terminal Corporation) for continuance of certain arrangements we have heretofore had with it. The nature of those requests are in the attached copy of my letter of today to Mr. F. W. Anderson of that Company.

We desire to cooperate with the government in every possible way to effectuate suitable and satisfactory arrange-

ments. But we have so little information about what is proposed to be done with respect to those terminals, how they will be operated, by whom, and the freight which will be handled, that we are encountering much difficulty and uncertainty in determining just what must or should be done.

355

EXHIBIT NO. .....
WITNESS .....
PAGE NO. 4

To aid us in reaching a conclusion, would it be possible for you to give me the following information:

1. By whom is it proposed that the terminal properties will be operated—The United States, the Navy Department, the War Department, the Army Transport Service, some other governmental agency, or some contractor such as the Lincoln Tidewater Terminals which operates other terminals at Norfolk now controlled by the Government.

2. By what designation should those terminals be shown in our tariffs?

3. To whom should the tariff provide for payment of wharfage and handling allowances?

4. Is the terminal to be used exclusively for Government traffic or will commercial freight also be handled?

If only Government freight is handled, it seems to us that it would be proper to provide for allowances for wharfage and handling in all instances where the rates are so published as to apply to or from shipside, *i. e.*, where they include wharfage and handling. In instances where the wharfage and handling charges are in addition to the line-haul rates, it is my understanding that the Government or its agency will perform those services itself, there will be no charges therefor by the carrier, and of course no allowance therefor would be made. If, on the other hand, other traffic is also to be handled, it may be necessary to work out some arrangement for the collection of wharfage and handling charges when they are not included in the line-haul rates and to compensate whoever performs those services by providing an allowance.

I shall appreciate it if you can supply this information and we shall then be able to devise a plan to accomplish what we desire.

Very truly yours,

s/ Cox,
General Traffic Manager.

cc—Col. John R. Kilpatrick,
C. O.,
Newport News, Va.

356

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 5

WAR DEPARTMENT
ARMY SERVICE FORCES
Office of the Chief of Transporation
Washington 25, D. C.

In Reply Refer to SPTOT 548.3
(Hampton Roads)

August 17, 1942.

Mr. O. W. Cox, General Traffic Mgr.,
Norfolk and Western Ry. Co.,
Roanoke, Virginia.

Dear Sir:

Reference is made to your letter of July 3, file 85244-A, regarding Army Base Piers No. 1 and 2 at Norfolk, Va.

The terminal properties will be operated and controlled by the War Department. Use of the facilities by the other armed forces or by private concerns will be by the express permission of the War Department.

The tariff should designate these piers as "War Department Army Base Piers No. 1 and 2, Norfolk, Virginia" and payment made to the "Treasurer of the United States, through the Commanding Officer, Hampton Roads Port of Embarkation, Newport News, Virginia".

It is intended to use the terminal facilities for Government traffic only. However circumstances may require the handling of commercial freight and in either instance the War Department or its agency will perform all services.

It is requested that provision be made at once for those allowances to the Government and consideration given to making them retroactive to June 15, 1942.

For the Chief of Traffic Control Division:

Very truly yours,

H. M. TOURVILLE,
Lt. Col., Transp. Corps,
Chief, Freight Branch.

357

Exhibit No. .....
Witness: .....
Page No. 6

WAR DEPARTMENT
ARMY SERVICE FORCES
Office of the Chief of Transporation
Washington 25, D. C.

In reply refer to SPTOT 548.3
(Norfolk, Va.)

October 14, 1942.

Mr. O. W. Cox, General Traffic Manager,
Norfolk and Western Railway Co.,
Roanoke, Virginia.

Subject: Wharfage and Handling Charges at Norfolk, Va.

Dear Sir:

Referring further to your letter of July 3, 1942, file 85244-A, covering allowance for wharfage and handling at Army Base Piers No. 1 and 2 at Norfolk, Va.

N & W Tariff G. F. No. 15-D has been amended in supplement 35 showing Army Base Piers No. 1 and 2 in lieu of Transport, Trading and Terminal Corp., but Section 6 of N & W Tariff G. F. No. 23-E has not been amended to provide for allowance to the Government of wharfage and handling charges at these piers, as was formerly accorded to the Transport, Trading and Terminal Corp.

It is, therefore, requested that Section 6 of N & W Tariff G. F. No. 23-E be amended to authorize allowance to the United States Government of one (1) cent per 100 pounds for wharfage and three (3) cents per 100 pounds for handling on freight handled over Army Base Piers No. 1 and 2.

Where rates are published to shipside, and delivery to the vessel is effected over a dock or wharf owned or operated by a railroad, the wharfage and handling charges are absorbed, and if delivery to the vessel is made over a dock or wharf owned or operated by a contractor or other commercial agency, the wharfage and handling charges are paid to such agency as an "allowance", and the lawfully published tariffs so provide.

358

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 7

In this instance, Army Base Piers No. 1 and 2 are the property of the Government and are operated by the War Department for its own exclusive use. The existence and operation of such Government facilities at North Atlantic Ports is clearly recognized by the specifically published application of Export rates in Agent B. T. Jones (Tariff 490-B and Agent W. S. Curlett's Tariff 107-B, which state that Export rates will apply on shipments "handled through United States Army Bases or delivered to United States Government vessels docked thereat".

Therefore, since the railroads absorb or make allowance for wharfage and handling charges on shipments handled over railroad or commercially owned or operated docks and wharves and also specifically provide for the application of Export rates to shipside at United States Army Bases, the allowance for such wharfage and handling charges should be made to the War Department on traffic handled over Army Base Piers No. 1 and 2 at Norfolk, Virginia. It is requested that Section 22 Quotation be issued, applying these allowances from June 15, 1942, the date of activation of the Hampton Roads Port of Embarkation.

Your early and favorable consideration of this proposal will be greatly appreciated.

For The Chief of Traffic Control Division:

Very truly yours,

R. M. BOYD,
Major, Transp. Corps,
Chief, Freight Branch.

358A

EXHIBIT NO. .....
WITNESS .....
PAGE NO. 8

WAR DEPARTMENT
ARMY SERVICE FORCES
Office of the Chief of Transportation
Washington 25, D. C.

In reply refer to SPTOT 548.3
(Norfolk, Va.)—FR

December 1, 1942.

Mr. A. F. Cleveland, Vice President,
Association of American Railroads,
Washington, D. C.

Dear Sir:

This office has had considerable correspondence with individual carriers serving the Hampton Roads Ports regarding allowances to the Government of wharfage and handling charges on traffic loaded into vessels across the Army Ammunition Pier at Newport News, Va. and Army Base Piers 1 and 2 at Norfolk, Va.

The Army has negotiated a contract with the Chesapeake and Ohio Ry. permitting the handling of War Department traffic over the railroad owned merchandise piers at Newport News, Va., and allowances are made to the Government for wharfage and handling of such traffic.

Prior to June 15, 1942, Army Base Piers 1 and 2 at Norfolk, Va. were leased by the Government to Transport, Trading and Terminal Corp., and carriers provided for the payment of allowances to this operator for wharfage and handling charges over these piers.

When the Government canceled this lease and took over the use and operation of these piers as War Department facilities, the terminal tariffs of the Norfolk carriers were not amended to authorize payment to the Government of the allowances formerly made to the civilian operator of these piers.

Where rates are published to shipside, and delivery to the vessel is effected over a dock or wharf owned or operated by a railroad, the wharfage and handling charges are absorbed, and if delivery to the vessel is made over a dock or wharf owned or operated by a contractor or other com-

mercial agency, the wharfage and handling charges are paid to such agency as an "allowance", and the lawfully published tariffs so provide.

359

EXHIBIT No. .....
WITNESS: .....
PAGE No. 9

In this instance, Army Base Piers No. 1 and 2 are the property of the Government and are now operated by the War Department for its own exclusive use. The existence and operation of such Government facilities at North Atlantic Ports is clearly recognized by the specifically published application of Export rates in Agent B. T. Jones' Tariff 490-B and Agent W. S. Curlett's Tariff 107-B, which state that Export rates will apply on shipments "handled through United States Army Bases or delivered to United States Government vessels docked thereat."

Therefore, since the railroads absorb or make allowance for wharfage and handling charges on shipments handled over railroad or commercially owned or operated docks and wharves and also specifically provide for the application of Export rates to shipside at United States Army Bases the allowance for such wharfage and handling charges should be made to the War Department on traffic handled over Army Base Piers No. 1 and 2 at Norfolk, Virginia. It is requested that Section 22 Quotation be issued, applying these allowances from June 15, 1942, the date of activation of the Hampton Roads Port of Embarkation.

As this matter has been the subject of correspondence for quite a while, this office will greatly appreciate any action which can be taken to bring this matter to a conclusion.

For the Chief of Traffic Control Division:

Very truly yours,

R. M. BOYD,
Major, Transp. Corps,
Chief, Freight Branch.

360

EXHIBIT NO. .....
WITNESS .....
PAGE NO. 10

ASSOCIATION OF AMERICAN RAILROADS
TRAFFIC DEPARTMENT
Transportation Building
Washington, D. C.

A. F. CLEVELAND
Vice President
R. N. NASH
W. J. KELLY
Assistants

February 16, 1943.
1-127-4

Wharfage and Handling Charges on War Department Export Freight.

Chief of Transportation,
War Department
Washington, D. C.

Attention: R. M. Boyd, Major, Transp. Corps,
Chief, Freight Branch.

Gentlemen:

Referring to your letter of December 1, 1942, file SPTOT 548.3 (Norfolk, Va.)—FR, in regard to the terminal situation at Newport News and Norfolk, Va.; also your letter of January 19 tracing for a reply.

This subject has been considered by the Chief Traffic Officers, by whom it was referred to the traffic executives of the Eastern and Southern groups. It has since been given careful consideration by the Eastern railroads, who recommend that where the control or operation of piers or other facilities is taken over by the government for its own use or they are operated under contract with the government and under government supervision, such facilities or piers should be treated the same as piers operated or controlled by the owners of the property transported and loading and unloading should not be performed by the carriers, nor any allowance made in lieu thereof.

The Southern lines have just advised me that their Executive Committee gave the subject full consideration and they recommend that no allowance should be made to the government for performing loading or unloading services

incident to the receipt or delivery of import and export freight at the piers or other port facilities under the exclusive jurisdiction of the government.

I am fully convinced that the action taken was proper and cannot believe that you will strenuously urge doing that which will be very embarrassing in other directions and at other ports.

Very truly yours,

s/ A. F. Cleveland.

361

Exhibit No. .....
Witness: .....
Page No. 11

Hampton Roads Port of Embarkation

SPTAK 548.3—TO

May 1st, 1943.

Mr. Randolph B. Cooke
General Freight Agent
Pennsylvania Railroad
Norfolk, Virginia

Dear Sir:

The Hampton Roads Port of Embarkation was activated June 15, 1942. At that time, the railroads serving Norfolk were requested, thru the Belt Line, to authorize amendment of the Belt Line Freight Tariff No. 6 J, ICC 105, to allow the War Department all wharfage and handling charges that formerly accrued to the Transport Trading and Terminal Corporation at the Army Base, Norfolk, Virginia.

The Belt Line Tariff has not been amended. While the refusal of certain carriers to allow the War Department such wharfage and handling charges is not a matter of port record, it is evident that the Belt Line was not authorized to publish the desired amendment.

It is believed that the War Department is entitled to wharfage and handling charges on all cargo moving over pier 1 and pier 2 of the Army Base. It is intended that the entire matter shall be placed before the Interstate Commerce Commission at the earliest possible moment. A prerequisite to the action appears to be the request from this port that the various carriers perform the services or make an allowance in lieu. In line with instructions from the Chief of Transportation, it is requested that the PRR perform the terminal services included in the line haul freight

rate, or make allowances in lieu thereof on car NYC 57535, containing vehicles moving on GBL WQ 7346467 from South Schenectady, N. Y., to Norfolk, Virginia, via NYC-PRR-Belt Line delivery to Norfolk, Virginia, Army Base. Cars on hand at the Army Base include 133 other cars routed to Norfolk via PRR, which moved on freight rates that included terminal charges. It is requested that such terminal services be performed by the PRR, or allowances made as provided in the various terminal tariffs.

The cargo contained in these cars is to be shipped immediately. Please favor this office with an early reply.

Yours very truly,

J. R. KILPATRICK
Brigadier General, U. S. Army
Commanding.

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 12

362

THE PENNSYLVANIA RAILROAD
TRAFFIC DEPT.

NORFOLK, VIRGINIA.
May 4, 1943
File 216-H-1

Brigadier General J. R. Kilpatrick,
Hampton Roads Port of Embarkation,
Newport News, Virginia.

Dear Sir:

Your letter of May 1st, File SPTAK-548.3-TO referring to Belt Line Freight Tariff No. 6 J, I. C. C. 105.

My understanding is that the matter of allowances for wharfage and handling to the War Department is before the executives of all the transportation companies and I can give you no answer on this point.

Our tariffs are not so published as to permit us at the present time to absorb wharfage and handling charges at the Army Base terminals. Therefore, we will be unable to grant your request to either absorb wharfage and handling charges on NYC 57535 and 133 other cars or perform the terminal service, which is covered by the Consolidated Freight Classification, until such time as the tariffs are

corrected permitting the Pennsylvania Railroad to absorb the charges referred to.

Yours very truly,

/s/ R. B. Cook

363

Exhibit No. .....
Witness: .....
Page No. 13

Hampton Roads Port of Embarkation

SPTAK 548.3-TD May 22, 1943.

Mr. G. F. Potter, GFA, A. C. L. RR, Wilmington, N. C.
Mr. T. Jefferson, Jr. GFA, C. & O Rwy., Richmond, Va.
Mr. C. H. Ware, GFA, N. S. RR., Norfolk, Va.
Mr. W. A. Huse, AFTM, N & W Rwy., Roanoke, Va.
Mr. R. B. Cooke, GFA, Penn. R. R., Norfolk, Va.
Mr. C. L. Seiter, GFA, S. A. L. Rwy., Norfolk, Va.
Mr. A. E. Hendee, GFA, Sou. Rwy., Atlanta, Ga.
Mr. J. F. Smith, GFA, Vgn. Rwy., Norfolk, Va.

Gentlemen:

Despite the fact that line haul export freight rates applicable to Norfolk, Virginia, from a large part of the United States include car unloading service, such service is not being performed by railroad labor, or at railroad expense at the Army Base, Norfolk, Virginia.

It is requested that the Carriers meet their legal obligation by performing unloading service, when line haul rates cover such service. Arrangements should be made by all the Norfolk lines, individually or jointly, to unload such traffic consigned to Hampton Roads Port of Embarkation, Army Base, Norfolk, Virginia, as a permanent operation.

Early advice as to your conclusion will be appreciated.

Very truly yours,

J. R. Kilpatrick
Brigadier General, U. S. Army
Commanding

364

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 14

THE VIRGINIAN RAILWAY COMPANY
TERMINAL BUILDING
Norfolk, Va.

May 24, 1943.
File No. C-5538-B

H. C. MITCHELL
Traffic Manager

A. F. SCHAFHIRT
Asst. Freight
Traffic Manager

J. F. SMITH
General Freight Agent

Terminal allowances to the United States Government on traffic handled through the Army Base at Norfolk, Va.

Mrs J. R. Kilpatrick, Brigadier General, U. S. Army,
Commanding Officer,
Hampton Roads Port of Embarkation,
Post Office Building,
Newport News, Va.

Dear Sir:

Referring to your joint letter of May 22, file SPTAK-548. TD:

This question received the attention of Chief Traffic Officers of the Eastern and Southern Lines recently and Mr. R. M. Boyd, Major, Transportation Corps, Chief, Freight Branch, was advised, under date of February 15, that it was decided that where the control or operation of piers or other facilities is taken over by the Government for its own use or they are operated under contract with the Government and under Government supervision, such facilities or piers should be treated the same as piers operated or controlled by owners of the property transported and loading and unloading could not be performed by the carriers, nor any allowance made in lieu thereof.

Yours very truly,

S J. F. SMITH
General Freight Agent.

CC: Mr. G. F. Potter, GFA, ACL RR, Wilmington, N. C.
Mr. T. Jefferson, Jr., GFA, C&O Ry., Richmond, Va.
249-5457-Z
Mr. C. H. Ware, TM, NS Ry., Norfolk, Va.
Mr. W. A. Huse, AFTM, N&W Ry., Roanoke, Va.
Mr. R. B. Cooke, GFA, PRR, Norfolk, Va.
Mr. C. L. Senter, GFA, SAL Ry., Norfolk, Va.
Mr. C. L. Batenian, GFA, Sou. Ry., Atlanta, Ga.

365

EXHIBIT No. ...
WITNESS: ...
PAGE No. 15

SEABOARD AIR LINE RAILWAY
FREIGHT TRAFFIC DEPARTMENT

Norfolk, Va., May 26, 1943
File NS 12565-K

Mr. J. R. Kilpatrick, Brigadier General, U. S. Army
Commanding
Hampton Roads Port of Embarkation
Port Office Building
Newport News, Va.

Dear Sir:

I wish to acknowledge receipt of your letter May 22nd, reference SPTAK 548.2-TD.

The matter covered by your letter has been considered previously by the executives of Eastern and Southern carriers, and in connection therewith, I am sending you herewith copy of letter Mr. A. F. Cleveland, Vice President, Association of American Railroads, wrote Chief of Transportation, War Department, Washington, D. C. on February 15, 1943 which outlines the position of the Eastern and Southern carriers.

S/ C. L. SENTER
General Freight Agent.

fbp/ah

cc – Mr. G. F. Potter, GFA, ACL RR, Wilmington, N. C.
Mr. T. Jefferson, Jr., GFA, C&O Ry., Richmond, Va.
Mr. C. H. Ware, GFA, NS RR, Norfolk, Va.
Mr. W. A. Huse, AFTM, N&W Ry., Roanoke, Va.
Mr. R. B. Cooke, GFA, Penn RR., Norfolk, Va.
Mr. A. E. Hendee, GFA, Sou. Ry., Atlanta, Ga.
Mr. J. F. Smith, GFA, Vgn. Ry., Norfolk, Va.

Exhibit No. .....
Witness: .....
Page No. 16

Norfolk and Western Railway Company
Freight Traffic Department

85704-C
Roanoke, Virginia,
May 31, 1943.

Brig. Gen. J. R. Kilpatrick,
U. S. Army Commanding,
Hampton Roads Port of Embarkation,
Newport News, Va.

Dear Sir:

Unloading at the Army Base at carriers' expense of export government freight.

—0—

Referring to your letter of May 22nd, file SPTAK 548.3-TD, in regard to the rail carriers unloading at their expense carload freight at the Army Base, Norfolk, for export when moving on road-haul rates that apply to shipside:

This is a matter that has previously been given extensive consideration at the hands of the carriers, not only as to the carriers unloading the freight at their expense, but also making an allowance to the Army authorities for the performance of that service.

The status of the Army Base, Norfolk, is that of a privately operated terminal at which there is handled only freight of the owners, and it is not the general practice of the railroads to unload freight at their expense at privately operated facilities, nor make an allowance in lieu of performance of that service.

In the consideration this matter has been given at the hands of the carriers, Norfolk was specifically dealt with as well as like facilities at other points. It is not felt we can comply with your request in this matter for the reasons given.

367

EXHIBIT No. .....
WITNESS: .....
PAGE No. 17

N & W Ry. Co. 85704-C
Ltr. to Brig. Gen. J. R.
Kilpatrick, Hampton
Roads Por E, 5/31/43

In this connection previous handling was of a National character, and I am enclosing herewith copy of letter of February 16th, 1942, addressed to Chief of Transportation, War Department, Washington, D. C., Attention Major Boyd, Transp. Corps, by Mr. A. F. Cleveland, Vice-President, Association of American Railroads, which was for account of all roads, and fully setting forth the reasons for action taken.

Yours very truly,

S/ W. A. HUSE
Asst. Freight Traffic Manager.

cc–
Mr. G. F. Potter, GFA, ACL, Wilmington, N. C.
Mr. Thos. Jefferson, Jr., GFA, C&O, Richmond, Va.
Mr. C. H. Ware, TM, NS Ry., Norfolk, Va.
Mr. R. B. Cooke, GFA, PRR, Norfolk, Va.
Mr. C. L. Senter, GFA, SAL, Norfolk, Va.
Mr. C. L. Bateman, GFA, Sou Ry., Atlanta, Ga.
Mr. J. F. Smith, GFA, Vgn. Ry., Norfolk, Va.

368

EXHIBIT No. .....
WITNESS: .....
PAGE No. 18

NORFOLK SOUTHERN RAILWAY COMPANY

C. H. WARE
Traffic Manager

NORFOLK, VA. June 7th, 1943. m.
File No. 27500-134-F.

ALLOWANCES: For Wharfage and Handling Charges on War Department Export Freight.

Brig. Gen. J. R. Kilpatrick,
U. S. Army, Commanding,
Hampton Roads Port of Embarkation,
Newport News, Va.

Dear Sir:

Referring to your joint letter of May 22nd, file SPTAK 548. 3 TD, in regard to the rail carriers unloading carload freight at the Army Base, Norfolk:

This subject has had previous consideration by the Chief Traffic Officers of the Eastern and Southern carriers, and R. M. Boyd, Major, Transp. Corps, Chief, Freight Branch, was advised on February 16th that where the control or operation of piers or other facilities is taken over by the Government for its own use, or operated under contract with the Government and under Government supervision, such facilities or piers should be treated the same as piers operated or controlled by the owners of the property transported and loading or unloading should not be performed by the carriers, nor any allowance made in lieu thereof.

Yours very truly,

S/ C. H. WARE
Traffic Manager.

(14)

cc– Mr. G. F. Potter, GFA, ACL RR., Wilmington, N. C. Fam-12454.
Mr. Thos. Jefferson, Jr., GFA, C&O, Richmond, Va. 249-5457-J.
Mr. W. A. Huse, AFTM, N&W, Roanoke, Va. 85704-C.
Mr. R. B. Cooke, GFA, PRR, Norfolk, Va.
Mr. C. L. Senter, GFA, SAL Ry., Norfolk, Va. NS 12565-K
Mr. C. L. Bateman, GFA, Sou. Ry., Atlanta, Ga. 4-3052.
Mr. J. F. Smith, GFA, Vgn. Ry., Norfolk, Va. C-5538-B.

369

EXHIBIT NO. .....
WITNESS .....
PAGE NO. 19

THE PENNSYLVANIA RAILROAD

TRAFFIC DEPARTMENT
NORFOLK, VA.

June 8, 1943.
File 216-H-1.

Brig. Gen. J. R. Kilpatrick, Commanding Officer,
Hampton Roads Port of Embarkation,
Newport News, Virginia.

Dear Sir:

Replying to your letter of May 22d, file SPTAK 548.3-TD, addressed to representatives of the rail lines serving the port of Hampton Roads, regarding unloading of freight at the Army Base, Norfolk.

I am enclosing copy of letter, written February 16, 1943, by Mr. A. F. Cleveland, Vice President, Association of

American Railroads, to the Chief of Transportation, War Department. You appreciate that we shall have to be governed by the instructions contained in that letter.

Yours very truly,

S/ RANDOLPH B. COOKE

RBC:NE
cy. Mr. G. F. Potter, G.F.A., A.C.L. R.R., Wilmington, N. C.
Mr. T. Jefferson, Jr., G.F.A., C&O Ry. Richmond, Va.
Mr. C. H. Ware, G.F.A., N.S. R.R., Norfolk, Va.
Mr. W. A. Huse, A.F.T.M., N&W Ry., Roanoke, Va.
Mr. C. L. Senter, G.F.A., S.A.L. Ry., Norfolk, Va.
Mr. C. L. Bateman, G.F.A., Southern Ry., Atlanta, Ga.
Mr. J. F. Smith, G.F.A., Virginian Ry., Norfolk, Va.

370

EXHIBIT NO. .....
WITNESS: .....
PAGE. NO. 20

ATLANTIC COAST LINE RAILROAD COMPANY
FREIGHT TRAFFIC DEPARTMENT
Wilmington, N. C.

June 10, 1943.
Fam-12454
Cy-5108

Handling Services at Norfolk, Va., in Connection with Export Rates Having Shipside Application.

Brig. Gen. J. R. Kilpatrick,
U. S. Army, War Department,
Hampton Roads Port of Embarkation,
Newport News, Va.

Dear General Kilpatrick:

On May 27th I acknowledged receipt of your joint letter of May 22nd, file SPTAK 548. 3-TD, and stated that, after looking into the matter, I would write you more definitely.

Since that time I have received copies of replies from various of the other roads addressed by you, in which they have referred you to the handling of this matter through Vice-President Cleveland of the Association of American Railroads. At the time I acknowledged receipt of your letter on May 27th, I had overlooked the handling mentioned by the other roads.

Yours very truly,

/s/ G. F. POTTER
General Freight Agent.

Copies to:
Mr. T. Jefferson, Jr., GFA, C&O Ry, Richmond, Va.—File 249-5457-J.
Mr. C. H. Ware, TM, NS Ry, Norfolk, Va.
Mr. W. A. Huse, AFTM, N&W Ry, Roanoke, Va.—File 85704-C.
Mr. R. B. Cooke, DFA, Penn. RR, Norfolk, Va.—File 216-H-1.
Mr. C. L. Senter, GFA, SAL Ry, Norfolk, Va.—File NS-12565-K.
Mr. C. L. Bateman, GFA, Sou Ry, Atlanta, Ga.—File 4-3052.
Mr. J. F. Smith, GFA, Vgn Ry, Norfolk, Va.—File C-5538-B

371

EXHIBIT NO. ....
WITNESS ....
PAGE NO. 21

SOUTHERN RAILWAY SYSTEM
FREIGHT TRAFFIC DEPARTMENT

ATLANTA, GA. July 7, 1943-S
4-3052

Brig.-Gen. J. R. Kilpatrick,
U. S. Army, War Department,
Hampton Roads Port of Embarkation,
Newport News, Virginia.

Dear Sir:

With further reference to your joint letter May 22, file SPTAK 548. 3-TD, dealing with the service of unloading export traffic consigned to Hampton Roads Port of Embarkation, Army Base, Norfolk, Va.:

You are informed of record previously made by Southern Lines Executive Committee that no allowance should be made to the Government for performing loading or unloading services incident to the receipt or delivery of import and export freight at the piers or other port facilities under the exclusive jurisdiction of the Government. This conclusion is based on the fact that the facilities in question should properly be treated the same as piers operated or controlled by the owners of the property transported in which event the carriers do not perform loading or unloading or make an allowance in lieu thereof.

As the terminal tariffs at Norfolk do not provide that carriers will unload traffic consigned to the Army Base, and in view of the previous consideration given the subject,

we are not in a position to comply with your request of May 22.

Yours truly,

/s/ C. L. Bateman
General Freight Agent.

ACH

cc: Mr. G. F. Potter, G.F.A., A.C.L. RR., Wilmington, N. C. (Fam-12454)
Mr. T. Jefferson, Jr., G.F.A., C. & O. Ry., Richmond, Va. (249-5457-J)
Mr. C. H. Ware, T.M., N.S. Ry., Norfolk, Va. (29500-134-F)
Mr. W. A. Huse, A.F.T.M., N. & W. Ry., Roanoke, Va. (85704-C)
Mr. R. B. Cooke, D.F.A., Pa. RR., Norfolk, Va. (216-H-1)
Mr. C. L. Senter, G.F.A., S.A.L. Ry., Norfolk, Va. (NS-12565-K)
Mr. J. F. Smith, G.F.A., Vgn. Ry., Norfolk, Va. (C-5538-B)

372

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 22

ARMY SERVICE FORCES
HAMPTON ROADS PORT OF EMBARKATION
Newport News, Va.

SPTAK 548.3-TD 9 November 1943

Mr. R. J. Doss, Vice President,
Atlantic Coast Line Railroad Company,
Wilmington, North Carolina.
Mr. H. L. White, Jr., Vice Pres. & Gen. Mgr.,
Norfolk & Portsmouth Belt Line Railroad,
Terminal Building,
Norfolk, Virginia.
Mr. George Dunglinson, Jr.,
Vice Pres., in Charge of Traffic,
Norfolk and Western Railway,
Roanoke 17, Virginia.
Mr. J. F. Dalton, Vice Pres.—Traffic,
Norfolk, Southern Railway Company,
Norfolk, Virginia.

Mr. Walter S. Franklin,
Vice Pres., in Charge of Traffic,
Pennsylvania Railroad,
Broad Street Station Bldg.,
Philadelphia, Pa.
Mr. George B. Rice,
Chief Freight Traffic Officer,
Seaboard Railway,
S. A. L. Bldg.,
Norfolk 10, Virginia.
Mr. E. R. Oliver, Vice Pres.—Traffic,
Southern Railway System,
Washington, D. C.
Mr. T. E. McAndrews, Vice Pres.—Traffic,
The Virginian Railway Company,
Norfolk 10, Virginia.

373

EXHIBIT No. ....
WITNESS: .....
Page No. 23

SPTA 548.3-TD 9 November 1943

Gentlemen:

Reference is made to negotiations which have been carried on with the carriers serving Norfolk, Virginia, since June 1942, with respect to the wharfage and handling charges situation at Army Base Piers Nos. 1 and 2 at Norfolk, on water-borne traffic originating in or destined to so-called absorption territory. The carriers have repeatedly declined to furnish the services or make an allowance in lieu thereof to the War Department for furnishing the wharfage facilities and performing the handling services. It would appear that the only recourse left open to the War Department is that of filing a formal complaint with the Interstate Commerce Commission unless the carriers will recede from their previously announced position of declining to render the services or make an allowance in lieu thereof.

In order to preclude any possibility of misunderstanding on the part of any interested party, the following demand is being made upon each of the line-haul carriers serving Norfolk and also upon the Norfolk and Portsmouth Belt Line Railroad.

Demand is hereby made that each of the railroads to whom this letter is addressed, immediately take the neces-

sary steps to fulfill completely its undertaking under line-haul "shipside" rates on water-borne traffic moving from and to so-called absorption territory (as defined in Norfolk terminal tariffs) to and from Norfolk, Virginia, and consigned to or shipped by the Hampton Roads Port of Embarkation. This traffic is now moving over Army Base Piers Nos. 1 and 2 and the Army, due to continued refusal of the railroads to perform lawful duties, is now perforce furnishing the wharfage facilities and performing the handling services which are included in the "holding out" by the railroads under their "shipside" line-haul rates, and is receiving no allowance therefor. The Army is paying the railroads for wharfage and handling. They are not "performing"—hence the demand. In this connection, your attention is directed to Section 6 (8) of the Interstate Commerce Act which reads in part as follows:

"That in time of war or threatened war * * * carriers shall adopt every means within their control to facilitate and expedite the military traffic."

374

EXHIBIT No. .....
WITNESS .....
PAGE No. 24

The War Department is now preparing a formal complaint to be filed with the Interstate Commerce Commission and in view of which if there is any change in the position of the carriers, this office should be advised immediately.

Very truly yours,

J. R. KILPATRICK
Brigadier General, U. S. Army
Commanding

EXHIBIT No. .....
WITNESS .....
375 PAGE No. 25.

THE VIRGINIAN RAILWAY COMPANY
TERMINAL BUILDING
Norfolk 10, Va.

November 16, 1943
File No. C-5538-A

T. E. McANDREWS
Vice President

Brigadier General J. R. Kilpatrick, USA,
Hampton Roads Port of Embarkation,
Newport News, Virginia.

Dear General Kilpatrick:

I wish to acknowledge receipt of your letter of November 9, file SPTAK 548. 3-TD.

I will study this situation and advise you concerning it at a later date.

Yours very truly,

/s/ T. E. McANDREWS

TEM-b
CC Mr R J Doss, VP, ACL RR., Wilmington, N. C.
Mr. H L White Jr., VP&GM, N&PBL RR., Norfolk, Va.
Mr Geo. Dunglinson, Jr, VP, N&W Ry., Roanoke Va.
Mr J F Dalton, VP, NS Ry., Norfolk Va
Mr Walter S Franklin, VP, PRR., Philadelphia, Pa,
Mr Geo. B. Rice, CFTO., SAL Ry., Norfolk, Va
Mr E R Oliver, VP, Southern Ry., Washington, D. C.

EXHIBIT No. .....
WITNESS: .....
376 PAGE No. 26

NORFOLK SOUTHERN RAILWAY COMPANY

J. F. DALTON
Vice President—Traffic

Zone 10
Norfolk, Va. November 16, 1943
File No. 27560-134-A

Brig. Gen. J. R. Kilpatrick
Hampton Roads Port of Embarkation
Newport News, Va.

My dear General:

I beg to acknowledge receipt of your letter of November 9th, file SPTAK 548 3-TD, and to say that at the writing no

definite conclusion different from that previously announced is made. However, your letter will receive further consideration and I shall write you again with respect thereto.

Yours very truly,

/s/ J. F. Dalton
Vice President—Traffic

b
13
cc: Messrs. R. J. Doss
H. L. White, Jr.
Geo. Dunglinson, Jr.
W. S. Franklin
G. B. Rice
E. R. Oliver
T. E. McAndrews

Exhibit No. .....
Witness: .....
Page No. 27

377

Seaboard Air Line Railway
L. R. Powell, Jr. and Henry W. Anderson, Receivers
Traffic Department

G. B. Rice,
Chief Freight Traffic Officer
W. A. Marshall,
W. J. Hdck,
Assistants

Norfolk, Va., November 19th, 1943. c
63593

General J. R. Kilpatrick,
Hampton Roads Port of Embarkation,
Newport News, Va.

Dear General Kilpatrick:

I have received your letter of November 9th addressed jointly to and others, file SPTAK 548. 3:TD, with reference to wharfage and handling at Army Base Piers Nos. 1 and 2 at Norfolk.

The matter referred to is now receiving consideration and I will write you again just as promptly as possible.

Yours very truly,

/s/ G. B. Rice
Chief Freight Traffic Officer.

Copies to:
Mr. R. J. Doss, VP, ACL RR, Wilmington, N. C.
Mr. H. L. White, Jr., VP&GM, N&P BL RR, Norfolk, Va.
Mr. Geo. Dunglinson, Jr., VP, N&W Ry., Roanoke, Va.
Mr. J. F. Dalton, VP, NS Ry., Norfolk, Va.
Mr. W. S. Franklin, VP, Penna RR, Philadelphia, Pa.
Mr. E. R. Oliver, VP, Southern Ry., Washington, D. C.
Mr. T. E. McAndrews, VP, Virginian Ry., Norfolk, Va.

EXHIBIT No. .....
WITNESS: .....
PAGE No. 28

378

SUBJECT:

NORFOLK AND WESTERN RAILWAY COMPANY
George Dunglinson, Jr.
Vice President in Charge of Traffic

In Your Reply Refer to File No. 106-3
Roanoke 17, Va., November 29th, 1943.

General J. R. Kilpatrick,
Hampton Roads Port of Embarkation,
Newport News, Virginia.

Dear General Kilpatrick:

I duly received your joint letter of November 9th, file SPTAK 548.3-TD, to the Chief Traffic Officers of the Port of Norfolk regarding allowances on Army traffic handled at Army Base Piers Nos. 1 and 2.

This matter is now receiving our attention and you will be more fully advised as quickly as possible.

Yours very truly,

/s/ GEORGE DUNGLINSON, JR.
Vice President.

cys: Messrs. R. J. Doss
H. L. White, Jr.
J. F. Dalton
W. S. Franklin
G. B. Rice
E. R. Oliver
T. E. McAndrews.

EXHIBIT No. .....
WITNESS .....
PAGE No. 29

379

THE PENNSYLVANIA RAILROAD COMPANY
General Office

WALTER S. FRANKLIN
Vice-President—Traffic

Broad Street Station Building
1617 Pennsylvania Boulevard
Philadelphia 4

November 30, 1943
File C

General J. R. Kilpatrick,
Hampton Roads Port of Embarkation,
Newport News, Virginia.

Dear General Kilpatrick:

This has reference to your letter of November 9th, file, SPTAK 548.3-TD, in connection with wharfage and handling charges at Army Base Piers Nos. 1 and 2, Norfolk, Virginia.

Please be assured that this matter will receive proper consideration and you will be further advised as promptly as possible.

Very truly yours,

/s/ W. S. FRANKLIN.

380

EXHIBIT No. .....
WITNESS .....
PAGE No. 30

SOUTHERN RAILWAY SYSTEM
Office of Vice President
In charge of Traffic

E. R. OLIVER
Vice President

Washington 13, D. C.
November 30, 1943. sbl.

Brigadier General J. R. Kilpatrick, U. S. A.,
Hampton Roads Port of Embarkation,
Newport News, Virginia.

Dear General Kilpatrick:

I have received your letter of November 9th, File SPTAK 548.3-TD, in regard to wharfage and handling at Army Base Piers Nos. 1 and 2, Norfolk, Va.:

otherwise provided herein, will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates, and also on traffic delivered to the party entitled to receive it at the carrier seaboard stations to which export rates apply which traffic is handled direct from carriers stations to steamship docks and on which required proof of exportation is given.

399

EXHIBIT NO. 4
WITNESS: HEIMBAUGH
PAGE NO. 1

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 29117

UNITED STATES OF AMERICA, COMPLAINANT

V.

ABERDEEN AND ROCKFISH RAILROAD CO., *Et Al.*
DEFENDANTS

STATEMENT SHOWING BASIS
ABSORPTION OF WHARFAGE AND HANDLING CHARGES
AT TERMINALS IN THE NORFOLK, VA., HARBOR DISTRICT NAMED HEREIN AS PUBLISHED IN TARIFFS ISSUED BY THE
ATLANTIC COAST LINE RAILROAD COMPANY
NORFOLK AND WESTERN RAILWAY COMPANY
NORFOLK SOUTHERN RAILWAY COMPANY
THE PENNSYLVANIA RAILROAD COMPANY
SEABOARD AIR LINE RAILWAY COMPANY
SOUTHERN RAILWAY COMPANY
THE VIRGINIAN RAILWAY COMPANY
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

ALSO

AT TERMINALS AT CERTAIN OTHER NORTH ATLANTIC PORTS

400

EXHIBIT NO.....
WITNESS.....
PAGE NO. 2

INDEX

	Page Nos. Incl.
Description of Absorption and Non-Absorption Territory in Terminal Tariffs of Norfolk Lines	3–9
Absorption Provisions of—	
Altantic Coast Line Railroad Tariff 91-2A, ICC B-3068	10–11
Norfolk and Western Ry. Tariff 23-F, ICC 9179	12–16
Norfolk Southern Railroad Tariff 338, ICC A-1148	17–19
Pennsylvania Railroad Tariff 1378-H, ICC 2613	20–23
Seaboard Air Line Railway Tariff 34-E, ICC 2915	24–25
Southern Railway System (Sou. Ry. Port Charges Trf. No. 10, ICC A-11013)	26–33
Virginian Railway Tariff 1813-K, ICC 2196	34–36
Norfolk and Portsmouth Belt Line Railroad Tariff 6-J, ICC 105	37–44
Names of Terminal Operators at Army Base Piers, Norfolk, Va.	45–46
Absorption Rules At—	
Baltimore, Md. (Pennsylvania RR Tariff 1320-I, ICC 2685)	47–48
Wilmington, Del. (Pennsylvania RR Tariff 1228-J, ICC 2665)	49–50
Philadelphia, Pa. (Pennsylvania RR Tariff 1145-F, ICC 2658)	51–52
New York Harbor, N. Y. (Curlett's ICC A-788, TLTB 116-B)	53
Boston, Mass. (Doe's ICC 424, NEFA 9-I)	54–55

401

Statement Showing Origin and Destination Stations Referred to in Exhibit No. . . Pages Nos. 12 to 44 from and to Which the Railroads Shown Below Publish Specific Provisions Concerning Wharfage, Handling and Terminal Charges at Norfolk, Va.

Stations (Station numbers are those shown in Open and prepay Station List No. 59 Agent A. P. Leland's ICC No. 24)	Apply Grouping as shown below when referred to in— Apply Section number shown below when referred to in Norfolk & Western Ry. Tariff ICC No. 9179	Virginian Ry. Tariff ICC No. 2196	Southern Ry. Tariff ICC No. A-11013	Norfolk Southern Ry. Tariff ICC No. A-1148	Norfolk & Portsmouth Belt R.R. Tariff ICC No. 105
ALL POINTS NOT PROVIDED FOR BELOW	1	C	1	C	C
ALABAMA—All Points	4	A	3	A	A
FLORIDA—All Points	4	A	3	A	A
GEORGIA—All Points	4	A	3	A	A
ILLINOIS—All Points	1	C	1	C	C
INDIANA—All Points	1	C	1	C	C
KENTUCKY:					
Covington Henderson Lexington Louisville Maysville Newport Owensboro Paducah	1	C	1	C	C

Stations (Station numbers are those shown in Open and prepay Station List No. 59 Agent A. P. Leland's ICC No. 24)	Apply Section number shown below when referred to in Norfolk & Western Ry. Tariff ICC No. 9179	Apply Grouping as shown below when referred to in— Virginian Ry. Tariff ICC No. 2196	Southern Ry. Tariff ICC No. A-11013	Norfolk Southern Ry. Tariff ICC No. A-1148	Norfolk & Portsmouth Belt R.R. Tariff ICC No. 105
Winchester	1	C	3	C	C
Ashland Catlettsburg Fort Thomas Elkhorn City Ludlow	4	A	1	A	C
402					Page No. 4
Carolina, Clinchfield and Ohio Ry.—All Stations	2	B	3	A	B
Chesapeake and Ohio Ry.—All Stations	1	C	1	C	C
Moorehead and North Fork R. R.—All Stations	1	C	1	C	C
Norfolk and Western Ry.—All Stations	2	B	2	A	B
All Other Points	4	A	3	A	C
LOUISIANA:					
Points west of the Mississippi River	3	D	1	C	C
All Other Points	4	A	3	A	A
MARYLAND—All Points	1	C	1	C	C
MICHIGAN—All Points	1	C	1	C	C
MINNESOTA—All Points	1	C	1	C	C
MISSISSIPPI—All Points	4	A	3	A	A
NEW YORK—All Points	1	C	1	C	C
NORTH CAROLINA:					
Norfolk and Western Ry. Stations:					
Hurricane Branch (Station No. 2320)	4	B	3	A	B
Nella to West Jefferson (Stations Nos. 2325 to 2390), inc.	2	B	2	A	B
All Other Points	4	A	3	A	A
403					Page No. 5
OHIO—All Points	1	C	1	C	C
PENNSYLVANIA—All Points	1	C	1	C	C
SOUTH CAROLINA—All Points	4	A	3	A	A
TENNESSEE:					
Bristol	2	B	3	B	B
All Other Points	4	A	3	A	A
VIRGINIA:					
Atlantic Coast Line R.R. Stations:					
Richmond (Station No. 10)	1	C	1	C	C
Richmond (Harrison St.) to Richmond (Bird St.) (Station Nos. 15 to 25), inc.	1	C	1	C	A
South Richmond (Station No. 30)	1	C	1	C	C
Clopton to Ellerslie (Station Nos. 35 to 80), inc.	1	C	1	C	A

Stations (Station numbers are those shown in Open and prepay Station List No. 59 Agent A. P. Leland's ICC No. 24)	Apply Section number shown below when referred to in Norfolk & Western Ry. Tariff ICC No. 9179	Apply Grouping as shown below when referred to in— Virginian Ry. Tariff ICC No.2196	Southern Ry. Tariff ICC No. A-11013	Norfolk Southern Ry. Tariff ICC No. A-1148	Norfolk & Portsmouth Belt R.R. Tariff ICC No.105
Petersburg (Station No. 90)	1	C	1	C	C
Suffolk	2	B	2	C	B
All Other Stations	4	A	3	C	A
Baltimore and Ohio R.R. —All Stations	1	C	1	C	C
Carolina, Clinchfield and Ohio Ry. Stations:					
All Stations South of St. Paul	4	A	3	C	A
All Other Stations	2	B	2	B	B

404 Page No. 6

Chesapeake and Ohio Ry. Stations:					
Buchanan Buena Vista) Charlottesville) Glasgow Lynchburg) Natural Bridge Orange) Waynesboro Waynesboro Union Station)	1	C	1	C	C
All Other Points	1	B	1	C	C
Chesapeake Western Ry. Stations:					
Bridgewater	1	C	1	C	C
Dayton	1	C	1	C	C
Harrisonburg	1	C	1	C	C
All other Stations	2	B	2	C	B
Danville and Western Ry. —All Stations	4	A	3	C	A
Interstate R. R.—All Stations	4	A	3	C	A
Louisville and Nashville R. R.—All Stations	4	A	3	C	A
Nelson and Albemarle Ry. —All Stations	2	B	2	C	C
Norfolk and Western Ry. Stations:					
Buchanan Buena Vista) Glasgow Lynchburg) Natural Bridge) Petersburg Roanoke) Waynesboro)	1	C	1	C	C
All Stations South of Brookneal Falwell Rustburg) Gladys Lone Jack) Pettys Naruna) Candler Winfall) Jennings, J. L.)	2	B	2	C	A
All Stations South of Roanoke	4	A	3	C	A
All Other Stations	2	B	2	C	B

Stations (Station numbers are those shown in Open and prepay Station List No. 59 Agent A. P. Leland's ICC No. 24)	Apply Section number shown below when referred to in Norfolk & Western Ry. Tariff ICC No. 9179	Apply Grouping as shown below when referred to in— Virginian Ry. Tariff ICC No. 2196	Southern Ry. Tariff ICC No. A-11013	Norfolk Southern Ry. Tariff ICC No. A-1148	Norfolk & Portsmouth Belt R.R. Tariff ICC No. 105
405					Page No. 7
Norfolk Southern R. R.—					
—All Stations	4	A	3	A	A
Pennsylvania R. R.—All Stations	1	C	1	C	C
Richmond, Fredericksburg and Potomac R. R.—					
All Stations	1	C	1	C	C
Seaboard Air Line Railway Stations:					
Ampthill	1	C	1	C	(8) C
Bellbluff	4	C	3	C	A
Barnes Bellwood					
Buckhead Chester					
Creamery Dixdistil	1	C	1	C	A
Petersburg Richmond	1	C	1	C	C
South Richmond	1	C	1	C	A
Hopewell Suffolk	2	B	2	C	B
All Other Stations	4	A	3	C	C

(8) Applicable only on import wood pulp.

406					Page No. 8
Southern Ry. Stations:					
Altavista	4	A	3	C	B
Bristol	2	B	2	B	B
Burkeville					
Front Royal Riverton	2	B	2	C	B
Suffolk	2	B	2	B	B
Waverly	2	A	2	C	B
Alexandria Charlottesville Lynchburg					
Orange Richmond					
Harrisonburg	1	C	1	C	C
Strasburg	4	A	1	C	C
Main Line Stations					
Alexandria to Winesap				C	(X) B
Sorocco to Boone (Stations Nos. 2722 to 2740	2	A	3	C	C
All Other Stations	4	A	3	C	C
Valley R. R.—All Stations	1	C	1	C	C
Virginia Blue Ridge Ry. —All Stations	4	A	3	C	C
Virginia Central Ry.— —All Stations	1	C	1	C	C

(X) Stations on Southern Railway Main Line Alexandria, to Winesap, Va., are included in Group B only on shipments of Apples, carloads for export.

Stations (Station numbers are those shown in Open and prepay Station List No. 59 Agent A. P. Leland's ICC No. 24)	Apply Grouping as shown below when referred to in— Apply Section number shown below when referred to in Norfolk & Western Ry. Tariff ICC No. 9179	Virginian Ry. Tariff ICC No. 2196	Southern Ry. Tariff ICC No. A-11013	Norfolk Southern Ry. Tariff ICC No. A-1148	Norfolk & Portsmouth Belt R.R. Tariff ICC No. 10
407					Page No. 9
Virginian Ry. Stations:					
Roanoke	1	C	1	C	C
All Other Stations	2	B	2	C	B
Washington and Old Dominion Ry.—All Stations	2	B	2	C	C
Winchester and Western R. R.—All Stations	1	C	1	C	C
WEST VIRGINIA:					
Chesapeake and Ohio Ry. Stations:					
All Stations Cotton Hill and East	2	C	2	C	C
All Other Stations	1	C	1	C	C
Norfolk and Western Ry. Stations:					
Ceredo Charles Town Kenova Shenandoah Jct.	1	C	1	C	C
All Other Stations	2	B	2	C	C
Virginian Ry. Stations:					
Beckley Oak Hill Pemberton	2	C	2	C	C
All Other Points	2	B	2	C	C
All Other Points	1	C	1	C	C

408

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. .....

STATEMENT SHOWING BASIS
FOR
ABSORPTION OF WHARFAGE, HANDLING AND TERMINAL CHARGES
AND
ALLOWANCES OF WHARFAGE AND HANDLING CHARGES
AT
TERMINALS WITHIN THE NORFOLK, VA. HARBOR DISTRICT SPECIFICALLY INDICATED HEREIN
AS PUBLISHED IN NORFOLK SOUTHERN RAILROAD COMPANY

TARIFF I.C.C. NO. A-1148 (RAILROAD TARIFF F.T.D. NO. 338)
Rule 170 effective 1 July 1941.

Absorption of Wharfage and Handling Charges on Import Traffic When Rates Are Published to Apply From Ship-

side. (Applicable Only on Traffic Destined to Points South of Charlotte, N. C., Moving Through Charlotte, N. C.)

When rates from Norfolk, Va., on import traffic are published to apply from shipside the Norfolk Southern Railroad Company will absorb wharfage and handling charges published and lawfully on file with the Interstate Commerce Commission, necessary to cover transfer from shipside to cars, on traffic for movement from Norfolk, Va., via Norfolk Southern Railroad Company.

Rule 175 effective 18 November 1943.

Application of Wharfage, Handling and Storage Charges At:

Imperial Tobacco Company, Ltd. (Berkley Warehouses and Tracks), Norfolk, Va.

Jones Cold Storage and Terminal Corporation, (East Water Street Terminals), Norfolk, Va.

Lamberts Point Docks, Inc. (Lamberts Point Division) Norfolk, Va. (7-A) C-1

Lincoln Tidewater Terminals, Inc., Norfolk, Va.

Municipal Grain Elevator, Norfolk, Va.

Norfolk Tidewater Terminals, Inc., At Pinners Point (Portsmouth, Va.)

Norfolk Warehouse Company, Inc., Norfolk, Va.

Southgate Terminal Corporation (Portsmouth Division Terminals)

Southgate Terminal Corporation (Norfolk Division Terminals) C-2

Rules and charges as published in Rule No. 180 of tariff or as amended apply at the Terminals as shown above and only on traffic moving in connection with the Norfolk Southern Railway Company.

409

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 18

Rule 180 effective 18 November 1943.

Absorption of Wharfage and Handling Charges At:

Imperial Tobacco Company, Ltd., (Berkley Warehouses and Tracks), Norfolk, Va.

Jones Cold Storage & Terminal Corporation (East Water Street Terminals), Norfolk, Va.

Lamberts Point Docks, Inc. (Lamberts Point Division), Norfolk, Va. (7-A) C-1.

Lincoln Tidewater Terminals, Inc., Norfolk, Va.

Municipal Grain Elevator, Norfolk, Va.

Norfolk Tidewater Terminals, Inc., at Pinners Point (Portsmouth, Va.)

Norfolk Warehouse Company, Inc., Norfolk, Va.
Southgate Terminal Corporation (Portsmouth Division Terminals).
Southgate Terminal Corporation (Norfolk Division Terminals). C-2

(a) On export, import, coastwise and intercoastal traffic originating at or destined to points shown in Group "C" Territory of this tariff (see Rule 1), moving through Charlotte, N. C., in connection with the Norfolk Southern Railway Company through the Terminals shown in this rule the charges for wharfage and handling will be:

Wharfage on all freight, per one hundred pounds ..... 1 cent
Handling on all freight, in closed cars per one hundred pounds ..... 3 cents

as published in tariffs referred to in Note 1 below, and will be included in the transportation rate applicable on such traffic to and from Norfolk, Va.

(b) On export, import, coastwise and intercoastal traffic originating at or destined to points other than those named in Group "C" Territory of this Tariff, (See Rule 1), moving in connection with the Norfolk Southern Railway through the terminals shown in this rule, on rates applicable to or from shipside, wharfage and handling charges will be as specifically shown in the rate tariffs containing shipside rates, and in the absence of such specific charges, same will be as shown in tariffs referred to in Note 1 below and will be included in the transportation rates on such traffic to or from Norfolk, Va. except that the allowance for wharfage or handling charges shall, in no case, exceed four (4) cents per 100 pounds.

(c) In all other respects the wharfage, handling, storage and all other charges as published in tariffs referred to in Note 1 below, will be in addition to the transportation rates applicable on such traffic to and from Norfolk, Va.

NOTE 1—Norfolk and Portsmouth Belt Line Railroad's I.C.C. No. 105 or Agent R. H. Hoke's Freight Tariff No. 326-G, I.C.C. No. 834, supplements to or successive issues thereof.

EXHIBIT NO. .....
WITNESS .....
PAGE NO. 19

Rule 185 effective 1 September 1943.

Allowances To:

Imperial Tobacco Co., Ltd., (Berkley Warehouses and Tracks), Norfolk, Va.

Jones Cold Storage & Terminal Corporation (East Water Street Terminals), Norfolk, Va.
Lamberts Point Docks, Inc., (Lamberts Point Division), Norfolk, Va. (7-A) C-1
Lincoln Tidewater Terminals, Inc.
Norfolk Tidewater Terminals, Inc., At Pinners Point (Portsmouth, Va.)
Norfolk Warehouse Company, Inc., Norfolk, Va.

For the use of wharves, warehouses, slips, channels, tracks and approaches, and other facilities at the terminals as listed in this rule, and for other services rendered by the terminals listed in this rule, as Agent for the Norfolk Southern Railway Company, the Norfolk Southern Railway Company will make an allowance equal to the amount of charges as provided in:

Agent R. H. Hoke's Freight Tariff No. 326-G, I.C.C. No. 834, supplements to or successive issues thereof, subject to maximum charges provided in Rule No. 180 to the terminals as listed in this rule, except charges for storage when held in cars, which charges accrue to the Norfolk Southern Railway Company.

C-1—Lamberts Point Docks, Inc., (Sewells Point Division), Norfolk, Va., formerly shown in this Rule is hereby CANCELLED. See Lincoln Tidewater Terminals, Inc.

C-2—Transport, Trading and Terminal Corporation, formerly shown in this Rule is hereby CANCELLED. No longer in operation.

(7-A)—REISSUED from Supplement No. 7, effective April 10, 1942.

411

EXHIBIT No.....
WITNESS:.....
PAGE No. 20

STATEMENT SHOWING BASIS
FOR
ABSORPTION OF WHARFAGE AND HANDLING CHARGES AT TERMINALS IN NORFOLK, VA., SPECIFICALLY INDICATED HEREIN
AS PUBLISHED IN THE PENNSYLVANIA RAILROAD COMPANY TARIFF I.C.C. No. 2613
(RAILROAD TARIFF No. 1378-H)

Item 305—Effective 1 December 1942

Transport, Trading and Terminal Corporation—

Any charge of the Norfolk & Portsmouth Belt Line Railroad for wharfage, storage, loading, unloading,

handling, transferring, or any service whatever at the Transport, Trading and Terminal Corporation, as per Norfolk & Portsmouth Belt Line Railroad Company Tariff 6-J, I.C.C. 105, will be in addition to the rate to or from Norfolk, Va., except that on export, import, coastwise and intercoastal traffic, any quantity, on which the freight rate is not less than 10 cents per 100 pounds, or $2.00 per ton, wharfage charge of 1 cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds or 60 cents per ton, will be included in the freight rate to or from Norfolk, Va., with the following exceptions (as per Items 375, 380 and 385).

Item 310—Effective 1 December 1942
Lincoln Tidewater Terminals, Inc.—

Any charge of the Norfolk and Portsmouth Belt Line Railroad Company for wharfage, storage, loading, unloading, handling, transferring, or any service whatever at, the Lincoln Tidewater Terminals, Inc. as per Norfolk and Portsmouth Belt Line Railroad Company's Tariff 6-J, I.C.C. 105, will be in addition to the rate to or from Norfolk, Va., except that on export, import, coastwise and intercoastal traffic, any quantity, on which the feright rate is not less than 10 cents per 100 pounds, or $2.00 per ton, wharfage charge of 1 cent per 100 pounds, and handling charge not to exceed 3 cents per 100 pounds, or 60 cents per ton will be included in the freight rate to or from Norfolk, Va., except as provided in Items 380 and 385.

412

EXHIBIT NO. .....
WITNESS .....
PAGE NO. 21

Item 385—Effective 1 December 1942
Lambert's Point Dock, Inc.—

On Export, Import, Intercoastal and Coastwise, traffic any quantity which pays the Pennsylvania Railroad Company and its connections 10 cents per 100 pounds, or over, or $2.00 per ton, or over, wharfage charge of one cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds or 60 cents per ton, will be included in the freight rate to or from Norfolk, Va., except as provided in Items 375, 380 and 385.

Item 375—Effective 1 December 1942
Absorption of Wharfage and Handling Charges—

(1) (a) Handling Charges will not be absorbed on freight in open cars, except on lumber, all kinds (including wooden logs, wooden poles, wooden ties and wooden piling), carloads (see paragraph (b)).

(b) When stowing in open cars is required handling charge of ½ cent per 100 pounds or 10 cents per 2000 pounds will be absorbed on lumber, all kinds (including wooden logs, wooden poles, wooden ties and wooden piling), carloads, loaded on open cars at the Lamberts Point Terminals (Norfolk & Western Railway Company Piers), Lamberts Point Docks, Inc.

Item 380—Effective 1 December 1942
Absorption of Wharfage and Handling Charges—

(2) Wharfage and/or charges will not be absorbed on freight accorded lighterage, or on grain or any other inbound or outbound traffic milled, mixed, malted or stored in transit at the Transport, Trading and Terminal Corporation; Lambert's Point Docks, Inc., Lincoln Tidewater Terminals, Inc., Norfolk Warehouse Company, Inc., H. B. Rogers, Inc. (Norfolk Division Terminals); Security Warehouse Corporation; Imperial Tobacco Company, Ltd., (Berkely Warehouse and Tracks); Norfolk Southern Railroad Company, Berkely Terminals; Jones Cold Storage and Terminal Corp. (East Water Street Terminals); Lamberts Point Terminals (Norfolk & Western Railway Company Piers), Norfolk, Va.; H. B. Rogers, Inc. (Portsmouth Division Terminals); Pier No. 1, Pinners Point Terminal, Portsmouth, Va., Norfolk Tidewater Terminals, Inc., Pinners Point (Portsmouth), Va.

413

EXHIBIT No. .....
WITNESS: .....
PAGE No. 22

Item 385—Effective 1 December 1942
Absorption of Wharfage and Handling Charges—

In all other respects on export, import, intercoastal and coastwise traffic the wharfage, handling, storage and/or other charges applicable at the Transport Trading and Terminals Corporation; Lambert's Point Docks, Inc., Lincoln Tidewater Terminals, Inc., Norfolk Warehouse Company, Inc., H. B. Rogers, Inc.,

(Norfolk Division Terminals) Security Warehouse Corporation; Imperial Tobacco Company, Ltd.; (Berkley Warehouses and Tracks); Norfolk Southern Railroad Company, Berkley Terminals; Jones Cold Storage and Terminal Corporation, (East Water Street Terminal); Lambert's Point Terminals, (Norfolk & Western Railway Company Piers), Norfolk, Va., H. B. Rogers, Inc., (Portsmouth Division Terminals), Pier No. 1; Pinners Point Terminal, Portsmouth, Va., and Norfolk Tidewater Terminals, Inc., Pinners Point (Portsmouth), Va., will be in addition to the rate to and from Norfolk, Va., or Portsmouth, Va., as the case may be published in tariffs lawfully on file with the Interstate Commerce Commission.

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 23

414

EXHIBIT
SHOWING INITIAL PUBLICATION
AUTHORIZING ABSORPTION OF WHARFAGE AND HANDLING
BY THE PREDECESSOR COMPANY OF THE PENNSYLVANIA
RAILROAD

No supplement to this tariff will be issued except for JCC No. 3328 the purpose of cancelling the tariff.
New York, Philadelphia and Norfolk Railroad Company

Joint Freight Tariff
of
Absorptions
of
Wharfage, Handling and Storage Charges
at
Municipal Terminals
Norfolk, Va.

Any charge of the Norfolk & Portsmouth Belt Line Railroad Company for wharfage, storage, unloading, handling, transferring or any service whatever, at the Municipal Piers or adjacent warehouses, Army Supply Base, as per Norfolk, Portsmouth Belt Line Railroad Company's Tariff I.C.C. No. 57, supplements thereto and reissues thereof, will be in addition to the rate to or from Norfolk, Va., except that on export and import traffic, in carloads,

originating at or destined to Trunk Line Western Termini Points (Note 1), and points west thereof, (except points in the south and southwest routing via Potomac Transfer, Va., Hagerstown Transfer, Md., and Richmond, Va.), the freight rate to and from Norfolk, Va., will include wharfage of 1 cent per 100 pounds and handling charge of 3 cents per 100 pounds, or 60 cents per ton, net or gross, as rated, except that the handling charge will not be included on freight in open-top cars.

NOTE 1.—The Trunk Line Western Termini referred to are as follows:

Suspension Bridge, N. Y.	Erie, Pa.
Niagara Falls, N. Y.	Pittsburg, Pa.
Tonawanda, N. Y.	Allegheny, Pa.
Black Rock, N. Y.	Bellaire, Ohio
Buffalo, N. Y.	Wheeling, W. Va.
East Buffalo, N. Y.	Parkersburg, W. Va.
Buffalo Junction, N. Y.	Point Pleasant, W. Va.
Dunkirk, N. Y.	Kenova, W. Va.
Salamanca, N. Y.	

The switching charge of the Norfolk & Portsmouth Belt Line Railroad Company are absorbed as per New York, Philadelphia and Norfolk Railroad Company Tariff I.C.C. No. 3329.

Issued Norfolk, Va., April 8, 1921 Effective April 15, 1921

Issued on five days' notice, under special permission of the Interstate Commerce Commission, No. 52468, of April 4, 1921.

By
RANDOLPH B. COOKE,
Division Freight Agent,
Norfolk, Va.

J. B. LARGE,	E. P. Bates,
Freight Traffic Manager,	Ass't Freight Traffic Manager
Eastern Region,	Eastern Region,
Philadelphia, Pa.	Philadelphia, Pa.
GUY S. MCCABE,	R. R. BLYDENBURGH,
General Freight Agent,	Ass't General Freight Agent,
Eastern Region,	Eastern Region,
Philadelphia, Pa.	Philadelphia, Pa.

Agents Index No. 54
500
(File 193-H-5)

Received
Month Day Year

417

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 26

STATEMENT SHOWING BASIS
FOR
ABSORPTION OF WHARFAGE OR HANDLING CHARGES
AT
TERMINALS WITHIN THE NORFOLK, VA. HARBOR DISTRICT
AS PUBLISHED IN SOUTHERN RAILWAY SYSTEM TARIFF
I. C. C. No. A-11013
(Southern Railway Port Charges Tariff No. 10)

Item 35—Effective 15 November 1942.

Absorption of Wharfage and or Handling Charges on Export, Import, Coastwise and Intercoastal Traffic at Berkley, Lambert Point, Norfolk, Pinners Point and Portsmouth, Va.

Except where tariffs lawfully on file with the Interstate Commerce Commission or Virginia State Corporation Commission specifically provide otherwise, when to or from points in Group 1, page 4, wharfage, handling or terminal charges shown below will apply and be included in the transportation charge (See Note E of this item).

Unless otherwise specifically provided in tariffs the terminal charges shown below must be deducted before prorating.

TABLE OF WHARFAGE AND HANDLING CHARGES.
In Cents Per Hundred Pounds, Unless Otherwise Specified.

Commodity Group Nos.	COMMODITIES	*Charges*
1	Cotton	2¼
2	Forgings, Iron or Steel. For Export: Same charges and conditions as applicable on Pig Iron, for export. (See Commodity Group No. 6.)	
3	Live Stock. Horses and mules	No Wharfage or handling charges when for export
4	Lumber, Poles, Ties and Piling. (See Note D, of this item)	1
5	Pig Iron. (Except as provided in Commodity Group No. 6), per ton of 2,240 pounds	14

418

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 27

6	Pig Iron and articles named in Note C below. For Export:	
	Wharfage and handling (Note A of this Item), including sixty (60) days storage on open piers, bulk heads or lands of Southern Railway, per ton (Note B, of this Item)	39
	Storage for each succeeding month or fraction thereof after expiration of the first sixty (60) days period, per ton (Note B, of this Item)	5½
7	All other freight	1

Note A—Applies on shipments from all points of origin, transported to the port on domestic bills of lading, and stored awaiting arrival of vessel, and will be in addition to the rate applicable to the port "proper" or for "ship-side delivery."

Note B—Charges apply per ton of 2,000 pounds or 2,240 pounds according as the rate to port, on which the shipment moves applies per ton of 2,000 or 2,240 pounds.

Note C—The charges published in this Item will apply on the following:

Bar, iron or steel	Pipe, iron or steel.	Steel cross ties,
Billets, iron or steel	Poles, iron or steel	Steel cross tie fastenings, in straight carloads with iron or steel rails or steel cross ties,
Boilers,	(Telegraph, Telephone or electric street railwa,)	
Boiler Tubes,	Rail fastenings in bundles, straight carloads, or mixed carloads with iron or steel rails.	Structural iron or steel.
Freight car parts, iron, steel or wood (each package or piece to weigh not less than 500 pounds.)		
Frogs and switches (when shipped with iron or steel rails),	Rails, iron or steel.	

Note D—In addition to the above wharfage, handling or terminal charges, the following charges will be assessed:

(a) On lumber, all kinds (including logs, wooden poles, wooden ties and wooden piling), paying rate in excess of nine and one-half (9½) cents per 100 pounds or one hundred and eighty-nine (189) cents per 2,000 pounds, a charge of thirty-nine (39) cents per 2,000 pounds for loading on open cars and eighty-three (83) cents per 2,000 pounds for loading into box cars, when the service is performed by or for account of the Southern Railway will be assessed in addition to the freight charge, which charge will accrue to the Southern Railway, whether handled direct from vessels to cars, or from piers to cars, or received from vessels by lighters or car floats, or received from intermediate storage.

419

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 28

(b) On lumber, all kinds (including logs, wooden poles, wooden ties and wooden piling), paying rate of less than nine and one-half (9½) cents per

100 pounds, or one hundred and eighty-nine (189) cents per 2,000 pounds, a charge of fifty-five (55) cents per 2,000 pounds (see paragraph c), for loading on open cars or eighty-three (83) cents per 2,000 pounds for loading into box cars, when the service is performed by or for account of the Southern Railway will be assessed in addition to the freight charge, which charge will accrue to the Southern Railway, whether handled direct from vessels to cars, or from piers to cars, or received from vessels by lighters or car floats, or received from intermediate storage.

(c) The combined freight and loading charges not to exceed 12 cents per 100 pounds or 237 cents per 2000 pounds for loading on open cars.

Note E—Delivery and receipt at Berkley, Lambert Point, Norfolk, Pinners Point and Portsmouth, Va. and absorption of terminal charges thereat.

On traffic received from or delivered to vessels over the piers of the Norfolk Southern R. R. at Berkley, Norfolk, and Western Ry. at Lambert Point or Norfolk, Atlantic Coast Line R. R. at Pinners Point or the Seaboard Air Line Ry. at Portsmouth, Va., when originating at or destined to points shown in Group 1, page 4, herein, the Southern Railway Company will absorb in the line haul rates the wharfage and handling charges not to exceed four (4) cents per one hundred pounds of the Norfolk Southern R. R. at Berkley, Norfolk and Western Ry. at Lambert Point or Norfolk, A. C. D. R. R. at Pinners Point or Seaboard Air Line Ry. at Portsmouth, Va. as published by those carriers for application at their respective terminals.

420

EXHIBIT NO.....
WITNESS: .....
PAGE NO. 29

Item 45—Effective 15 November 1942.

Table of Wharfage, Handling or Terminal Charges. (Applicable at Norfolk, Pinners Point, Portsmouth and West Norfolk, Va.)

Except where tariffs lawfully on file with Interstate Commerce Commission or Virginia State Corporation Commission specifically provide otherwise, the wharfage, handling or terminal charges shown in this Table will apply and be in addition to the transportation charges.

Applicable on Coastwise, Export and Import Traffic from or to the following points, viz:

Applicable on coastwise, export and import traffic from or to points designated in Group 2, Item 1 herein, and Southern Railway stations Alexandria, Va. (Index 15) to Winesap, Va. (Index 315), inclusive (See Note A of this Item).

For list of stations (and Station Index numbers in connection therewith) see Agent A. P. Leland's I. C. C. No. A-22, Official List of Open and Prepay Stations No. 57, supplements thereto or reissues thereof.

Cotton, per 100 pounds	2¼ cents
Live Stock, per 100 pounds	3¾ cents
Lumber and other Forest Products taking Lumber rates as per tariff applicable from points of origin of the traffic, lawfully on file with the Interstate Commerce Commission and Virginia State Corporation Commission, per 100 pounds (See Note B of this Item)	1¾ cents
Lumber, Logs, Poles, Ties and Piling (See Note B of this Item)	3 cents
Pig Iron, per ton 2,240 pounds	14 cents
All other freight, per 100 pounds (See Note C of this Item)	1 cent

Note A—Stations on Southern Railway Alexandria, Va. (Index 15) to Winesap, Va. (Index 315), inclusive, are included in this Table only on export shipments of apples, in carloads.

Note B—In addition to the above wharfage, handling or terminal charges, the following charges will be assessed:

(a) On lumber, all kinds (including logs, wooden poles, wooden ties and wooden piling), paying rate in excess of nine and one-half (9½) cents per 100 pounds or one hundred and eighty-nine (189) cents per 2,000 pounds, a charge of thirty-nine (39) cents per 2,000 pounds for loading on open cars and eighty-three (83) cents per 2,000 pounds for loading into box cars when the service is performed by or for account of the Southern Railway will be assessed in addition to the freight charge, which charge will accrue to the Southern Railway, whether handled direct from vessels to cars, or from piers to cars, or received from vessels by lighters or car floats, or received from intermediate storage.

421

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 30 .....

Item 45—Effective 15 November 1942—Cont'd:

(b) On lumber, all kinds (including logs, wooden poles, wooden ties and wooden piling), paying rate of less than nine and one-half (9½) cents per 100 pounds, or one hundred and eighty-nine (189) cents per 2,000 pounds, a charge of fifty-five (55) cents per 2,000 pounds (See paragraph c) for loading on open cars or eighty-three (83) cents per 2,000 pounds for loading into box cars, when the service is performed by or for account of the Southern Railway will be assessed in addition to the freight charge which charge will accrue to the Southern Railway, whether handled

direct from vessels to cars, or from piers to cars, or received from vessels by lighters or car floats, or received from intermediate storage.

(c) The combined freight and loading charges not to exceed 12 cents per 100 pounds or 237 cents per 2,000 pounds for loading on open cars.

Note C—On shipments of apples, carloads, for export, originating at stations on Southern Railway Alexandria, Va. (Index 15) to Winesap, Va. (Index 315), inclusive, the current rates to Norfolk will include the export terminal charge of one (1) cent per 100 Pounds.

Item 60—Effective 15 November 1942.

Wharfage and Handling Charges on Coastwise Traffic at Brunswick, Ga., Charleston, S. C., Chickasaw, Ala., Jacksonville, Fla., Mobile, Ala., Newport News, Va., Norfolk, Va., Pinners Point, Va., Portsmouth, Va., Savannah, Ga., West Norfolk, Va. and West Point, Va.

Absorption of Wharfage and Handling Charges on Traffic Delivered to Steamships at Port.

(a) In the absence of through rates, or specific rates on coastwise traffic via the Southern Railway to Brunswick, Ga., Charleston, S. C., Chickasaw, Ala., Jacksonville, Fla., Mobile, Ala., Norfolk, Va., Pinners Point, Va., Portsmouth, Va., Savannah, Ga., West Norfolk, Va., and West Point, Va. (See Exceptions of this Item), inland domestic rates will apply to shipside (see Note A of this Item) when originating at points in the following states:

Arizona,	Michigan,	Pennsylvania,
Arkansas,	Minnesota,	South Dakota,
California,	Missouri,	Texas,
Colorado,	Montana,	Utah,
Idaho,	Nebraska,	Washington,
Illinois,	Nevada,	West Virginia,
Indiana,	New Mexico,	Wisconsin,
Iowa,	North Dakota,	Wyoming,
Kansas,	Ohio,	
Louisiana (West of Mississippi River),	Oklahoma,	
	Oregon,	

Also

Ashland	Ky.	Ludlow	Ky.
Catlettsburg	Ky.	Maysville	Ky.
Covington	Ky.	Memphis	Tenn.
Fort Thomas	Ky.	Newport	Ky.
Henderson	Ky.	Owensboro	Ky.
Louisville	Ky.	Paducah	Ky.

422

EXHIBIT NO.....
WITNESS: .....
PAGE NO. 31

Item 60—Effective 15 November 1942—Cont'd.

(b) Except as provided in paragraph (a) where rates are not applicable to shipside, wharfage and handling charges shown in Agent R. H. Hoke's I. C. C. No. 654 (Port Charges Tariff 326-F), supplements thereto, or reissues thereof, will be added to cover delivery to shipside at Brunswick, Ga., Charleston, S. C., Chickasaw, Ala., Jacksonville, Fla., Mobile, Ala., Norfolk, Va., Pinners Point, Va., Portsmouth, Va., Savannah, Ga., West Norfolk, Va., and West Point, Va.

Note A: The provisions of paragraph (a) only apply when the haul from the points shown in paragraph (a), to the port, is via these lines.

EXCEPTIONS

The provisions of this Item will not apply on:

Cotton and Cotton Linters, Lumber and Articles taking same rates or arbitraries higher, rates apply to shipside only when so specifically published in the tariffs publishing the rates otherwise wharfage and handling charges as provided in Agent R. H. Hoke's I. C. C. No. 654 (Port Charges Tariff 326-F), supplements thereto or reissues thereof, will be in addition to the through rate.

Grain and Grain Products handled through elevators at Chickasaw, Ala., or the Port of Mobile, Ala., for coastwise movement the elevator charges will be in addition to the rates for transportation of the grain and grain products to Chickasaw, Ala.; or Mobile, Ala.

Coastwise shipments of fertilizer and fertilizer materials, as described in Agent R. H. Heke's Tariff 392-C I. C. C. No. 636, supplements thereto or successive thereof.

423

EXHIBIT NO.....
WITNESS: .....
PAGE NO. 32

Item 80—Effective 15 November 1942.

Absorption of Wharfage and Handling Charges at Norfolk, Va. on Traffic Moving Through:

Lincoln Tidewater Terminals, Incorporated.
Transport Trading & Terminal Corporation.
Southgate Terminals (Portsmouth Division).

(a) On export, import and coastwise traffic originating at or destined to points shown in Territorial Group 1, page

4, moving in connection with the Southern Railway through the terminals listed above, a wharfage charge of 1 (one) cent per hundred pounds on all freight and a loading or unloading charge of 3 (three) cents per hundred pounds on all freight in closed cars, as published in Norfolk and Portsmouth Belt Railroad Company's I. C. C. No. 105, supplements thereto or successive issues thereof, will be included in the transportation rate applicable on such traffic to or from Norfolk, Va.

(b) On export, import and coastwise traffic originating at or destined to points other than those named in Territorial Group 1, page 4, moving in connection with the Southern Railway through the terminals listed above, on rates applicable to or from shipside, the wharfage and handling charges as published in Norfolk and Portsmouth Belt Railroad Company's I. C. C. No. 105, supplements thereto or successive issues thereof, will be included in the transportation rate on such traffic to or from Norfolk, Va., except that the allowance for wharfage or handling shall in no case exceed 4 (four) cents per hundred pounds.

(c) In all other respects the wharfage, handling, storage and all other charges as published in Norfolk and Portsmouth Belt Railroad Company's I. C. C. No. 105, supplements thereto or successive issues thereof, will be in addition to the transportation rate applicable on such traffic to or from Norfolk, Va.

424

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 33

Item 85—Effective 15 November 1942.

Absorption of Wharfage and Handling Charges at Norfolk, Va. on Traffic Moving Through:

Imperial Tobacco Company's Berkley Terminals.
Jones Cold Storage Corporation.
Lambert's Point Docks, Incorporated.
Norfolk Tidewater Terminals, Incorporated.
Norfolk Warehouse Company, Incorporated.
Security Warehouse Corporation.

(a) On export, import and coastwise traffic originating at or destined to points shown in Territorial Group 1, page 4, moving in connection with the Southern Railway through the terminal listed above, a wharfage charge of 1 cent per hundred pounds on all freight and a loading or unloading charge of 3 cents per hundred pounds on all freight in

closed cars, as published in Agent R. H. Hoke's I. C. C. No. 654 (Port Charges Tariff 326-F), supplements thereto or successive issues thereof, will be included in the transportation rate applicable on such traffic to or from Norfolk, Va.

(b) On export, import and coastwise traffic originating at or destined to points other than those named in Territorial Group 1, page 4, moving in connection with the Southern Railway Company through the terminals listed above, on rates applicable to or from shipside, the wharfage and handling charges as published in Agent R. H. Hoke's I. C. C. No. 654 (Port Charges Tariff 326-F), supplements thereto or successive issues thereof, will be included in the transportation rate on such traffic to or from Norfolk, Va., except that the allowance for wharfage and handling shall in no case exceed 4 cents per hundred pounds and except, further that the allowance on apples, carloads, from Southern Railway stations Alexandria, Va. (Index 15) to Winesap, Va. (Index 315) inclusive, of Agent A. P. Leland's I. C. C. No. A-22 (Official List of Open and Prepay Stations No. 57), supplements thereto or successives issues thereof, shall not exceed 1 cent per hundred pounds.

(c) In all other respects the wharfage, handling, storage and all other charges as published in Agent R. H. Hoke's I. C. C. No. 654 (Port Charges Tariff 326-F), supplements thereto or successive issues thereof, will be in addition to the transportation rates applicable on such traffic to or from Norfolk, Va.

425

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 34

STATEMENT SHOWING BASIS
FOR
ABSORPTION OF WHARFAGE, HANDLING AND TERMINAL CHARGES
AT
TERMINALS WITHIN THE NORFOLK, VA., HARBOR DISTRICT
SPECIFICALLY INDICATED HEREIN
AS PUBLISHED IN
THE VIRGINIAN RAILWAY COMPANY TARIFF I. C. C. No. 2196
(RAILROAD TARIFF No. 1813-K)

Item 1700, effective as amended 10 April 1942.

At Lincoln Tidewater Terminals, Inc., Transport Trading & Terminal Corporation or Southgate Terminal Corporation (Portsmouth Division Terminals).

Wharfage, handling and terminal charges, as published in Norfolk and Portsmouth Belt Line Railroad Tariff No. 6-J, I. C. C. No. 105 will be included in the transportation rates applicable to or from Norfolk, Va., on the following traffic moving in connection with the Virginian Railway through the above terminals:

(a) Export, import, intercoastal and coastwise shipments, regardless of weight, originating at, or destined to points taking Groups C and D, except as provided in Notes A and B, below.

(b) Export carload shipments of Apples originating on the Virginian Railway.

Except as otherwise provided above and in tariffs lawfully on file with the Interstate Commerce Commission, the wharfage, handling, storage or other charges published in Norfolk and Portsmouth Belt Line Railroad Tariff No. 6-J, I. C. C. No. 105, will be in addition to the transportation rates on such traffic to or from Norfolk, Va.

426

EXHIBIT NO.....
WITNESS: .....
PAGE NO. 35

Item 1700, effective as amended 10 April 1942—Cont'd.

Effective 10 April 1942, Supplement 7 amended this tariff as follows:

CHANGE IN NAME OF TERMINAL OPERATORS

Wherever the Terminal Operator shown in Column 1, below, appears in Tariff, as amended, it is hereby changed to read as shown in Column 2, below:

COLUMN 1	COLUMN 2
Now Reads	Change to Read
Lambert's Point Docks, Inc., (Sewalls Point Division) Norfolk, Virginia	Lincoln Tidewater Terminals, Inc., Norfolk, Virginia

Item 1730, effective 30 April 1941.

At Lambert's Point Docks, Inc. (Lambert Point Division) or Norfolk and Western Railway Lambert Point or Norfolk Terminals.

Wharfage and handling charges of not to exceed four (4) cents per hundred pounds on all freight as published in Norfolk and Western Railway Tariff G. F. No. 23-E),

I. C. C. No. 9101, will be included in the transportation rates applicable to or from Norfolk, Va., on the following traffic moving in connection with the Virginian Railway through above terminals:

(a) Export, import, intercoastal and coastwise shipments, regardless of weight, originating at, or destined to points taking Groups C and D, except as provided in Notes A and D, below.

(b) Export carload shipments of Apples originating on the Virginian Railway.

Except as otherwise provided above and in tariffs lawfully on file with the Interstate Commerce Commission, the wharfage, handling, storage or other charges published in Norfolk and Western Railway Tariff G. F. No. 23-E, I. C. C. No. 9101, will be in addition to the transportation rates applicable on such traffic to or from Norfolk, Va.

427

EXHIBIT, No. .....
WITNESS .....
PAGE No. 36

Item 1730 effective 30 April 1941—Cont'd.

Explanation of notes referred to above—

NOTE A—The above wharfage and handling charges will not be included in the transportation rate on imported shipments of newsprint paper when moving from the port to destinations to which domestic rates are named in Agent F. D. Miller's Tariff 718-B, I. C. C. 518, and to destinations taking same rates as named in Agent F. D. Miller's (Pope Series) Southern Group Basis Tariff 700-A, I. C. C. 200.

NOTE B—The loading charges on lumber, logs, wooden poles, wooden ties and wooden piling, published in Note C, Item 910, Norfolk and Portsmouth Belt Line Railroad Tariff 6-J, I. C. C. 105, will not be included in the transportation rate, but will be in addition.

NOTE D—The loading charges on lumber, logs, wooden poles, wooden ties and wooden piling, published in Note A of Section 9 to Norfolk and Western Railway Tariff GF-23-E, I. C. C. 9101, will not be included in the transportation rate, but will be in addition.

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 37

STATEMENT SHOWING BASIS
FOR
ALLOWANCES TO THE LINCOLN TIDEWATER TERMINALS, INCORPORATED
AND/OR TRANSPORT TRADING & TERMINAL CORPORATION
AT NORFOLK, VA.
AS PUBLISHED IN NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY
TARIFF I. C. C. NO. 105 (RAILROAD TARIFF NO. 6-J)

Item No. 100-B effective 8 June 1942.

For the use of wharves, warehouses, slips, channels, tracks and approaches and other facilities at the Lincoln Tidewater Terminals, Incorporated and/or Transport Trading & Terminal Corporation, Norfolk, Virginia, and for other services rendered by the Lincoln Tidewater Terminals, Incorporated and/or Transport Trading & Terminal Corporation, as Agent for Norfolk and Portsmouth Belt Line Railroad Company, the Norfolk and Portsmouth Belt Line Railroad *makes an allowance*, equal in the amount of charges provided in this tariff, or as amended, to the Lincoln Tidewater Terminals, Incorporated and/or Transport Trading & Terminal Corporation, except on Import and Inbound Coastwise Lumber, Wooden Poles, Wooden Piling and Wooden Ties, carloads, to points in Group "B" (see page 10 of tariff, or as amended), the Lincoln Tidewater Terminals, Incorporated and/or Transport Trading & Terminal Corporation will receive an allowance of 1½ cents per 100 pounds, and on Import and Inbound Coastwise Logs, carloads, to points in Group "B" (see page 10 of tariff, or as amended), the Lincoln Tidewater Terminals, Incorporated and/or Transport Trading & Terminal Corporation will receive an allowance of 1 cent per 100 pounds, the remainder of the wharfage and handling charge to accrue to the road haul carrier, and except demurrage or storage when held in cars which accrued to Norfolk and Portsmouth Belt Line Railroad Company.

Group "B" referred to in item 100-B, quoted above, is explained on pages 3-9 of this exhibit.

Effective 10 April 1942, Supplement 22 amended this tariff as follows:

CHANGE IN NAME OF TERMINAL OPERATORS

Wherever the Terminal Operator shown in Column 1 below, appears in Tariff, as amended, it is hereby changed to read as shown in Column 2, below:

COLUMN 1	COLUMN 2
Now Reads	Change to Read
Lamberts Point Docks, Incorporated (Sewalls Point Division)	Lincoln Tidewater Terminals, Incorporated.

429

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 38

Item 100-A, effective 1 July 1940, provided for the allowances named in that item to the

Lamberts Point Docks, Incorporated
(Sewalls Point Division)
and/or
Transport Trading & Terminal Corporation

Item 100, effective 22 September 1938, in the tariff, provided for the allowances named in that item to the

Lambert's Point Terminal Corporation
(Sewalls Point Division)
and/or
Norfolk Tidewater Terminals.

430

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 39

STATEMENT
SHOWING
WHARFAGE, HANDLING AND TERMINAL CHARGES
APPLICABLE ON TRAFFIC TO OR FROM SO-CALLED "ABSORPTION TERRITORY" AS PUBLISHED IN NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY
TARIFF I. C. C. NO. 105 (RAILROAD TARIFF NO. 6-J)

SECTION 2.

APPLICATION OF RATES.

Item 905-E—Effective 1 August 1943.

The wharfage, storage and handling or terminal charges shown in this section will apply on traffic to and from points shown in Group "B" on page 10 of Tariff.

TABLE OF WHARFAGE, HANDLING OR TERMINAL CHARGES

Cotton, wharfage and handling, per 100 pounds		2¼ cents
Grain in bulk, wharfage only per 100 pounds (Note A)		1 cent
Liquid Caustic Soda (Sodium hydroxide). (See Item 915-B)		
Live Stock, wharfage and handling, per 100 pounds		3¾ cents
Lumber and other Forest Products taking Lumber rates, wharfage and handling, per 100 pounds	(1)	1¾ cents
Lumber, Wooden Poles, Wooden Piling, Wooden Ties, and Pulpwood, carloads, wharfage and handling, per 100 pounds (Note B)	(2)	3½ cents
Lumber, Wooden Poles, Wooden Piling, Wooden Ties, and Pulpwood, (see Notes I and C), wharfage and handling, per 100 pounds	(7)	1¾ cents
Logs (see Notes I and C), wharfage and handling, per 100 pounds	(2)	1 cent

431

EXHIBIT NO.....
WITNESS: .....
PAGE NO. 40

Item 905-E—Effective 1 August 1943—Cont'd.

TABLE OF WHARFAGE, HANDLING OR TERMINAL CHARGES—Cont'd.

Note 1.—In addition to the above wharfage and handling charges on lumber, not otherwise indexed by name in Official Classification, (including logs, wooden poles, wooden piling, wooden ties and Pulpwood), Domestic or Foreign, received direct from vessels to cars, or from piers to cars, or received from vessels by lighters or car floats, or received from intermediate storage, when loaded into or on cars for account of the line-haul carrier, the following charges will be assessed in addition to the freight charges, and will accrue to the line-haul carrier:	LOADING CHARGE, Per ton 2,000 pounds	
	When loaded on open cars direct from vessels	When loaded on open cars or into closed cars from piers, intermediate storage or lighters
On traffic paying rate of 10 cents per 100 pounds or higher	50 cents	100 cents
On traffic paying rate of less than 10 cents per 100 pounds	#55 cents	(D) 100 cents

Combined freight and loading charges not to exceed 12½ cents per 100 pounds or $2.50 per ton 2,000 pounds.

(D) Combined freight and loading charges not to exceed 15 cents per 100 pounds or $3.00 per ton 2,000 pounds.

Logs, carloads, wharfage and handling, per 100 pounds (Note B)	(2)	3 cents
Pig Iron, wharfage and handling, per ton 2,240 pounds		14 cents
All other freight, wharfage and handling, per 100 pounds		1 cent

Note A.—On bulk grain, elevator charges lawfully on file with Interstate Commerce Commission will be in addition to the wharfage.

Note B.—Not applicable on shipments forwarded via Norfolk and Western Railway or The Virginian Railway.

Note C.—Applicable only on shipments forwarded via Norfolk and Western Railway or The Virginian Railway.

Item 905-D—Effective 8 June 1942.

Increased the charges in Note 1 for closed cars from 83¢ to $1.00 and open cars from 39¢ to 50¢. No change in the 55¢ charge.

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 41

Item 905-C—Effective 1 December 1940.

Change in wording was published which made neither increases nor reductions in charges.

Item 905-B—Effective 15 March 1939.

Charge on liquid caustic soda transferred to item 915-series.

Item 905-A—Effective 14 January 1939.

Established wharfage charge on liquid caustic soda which charge was later transferred to item 915-series.

Item 905—Effective 22 September 1938.

Increased the minimum line-haul rate shown in Note 1 to 10¢ (paragraph (a)) and 12¢ (paragraph (b)).

SECTION 3

APPLICATION OF RATES

Item 910-E—Effective 1 August 1943.

The wharfage, storage, handling or terminal charges shown in this section will apply on traffic to and from points shown in Group "C" on page 10 of Tariff.

TABLE OF WHARFAGE, HANDLING OR TERMINAL CHARGES

Fertilizer Materials, imported and shipped to Richmond and South Richmond, Va., wharfage and handling per ton 2,000 pounds	50 cents
Freight in open top cars, except as otherwise shown, and tank cars, wharfage only, per 100 pounds	1 cent
Import and inbound coastwise lumber and other forest products taking lumber rates and pulpwood when stowing in open top cars is required and freight is forwarded via Nor-	

folk & Western Railway, The Pennsylvania Railroad or The Virginian Railway:

Wharfage, per 100 pounds	1 cent.
Handling, per 100 pounds (Note C)	2 cents.

433

EXHIBIT No. .....
WITNESS: .....
PAGE No. 42

Item 910-E—Effective 1 August 1943—Cont'd.

TABLE OF WHARFAGE, HANDLING OR TERMINAL CHARGES—Cont'd.

Grain in bulk, wharfage only per 100 pounds (Note A)	1 cent.
Liquid Caustic Soda (Sodium hydroxide). (See Item 915-B)	.....
Tobacco, unmanufactured, shipped from Richmond or South Richmond, Va., for export, (when moving on rates not subject to storage in transit privilege) or imported and shipped to Richmond or South Richmond, Va., wharfage and handling, per 100 pounds	2.1 cents.
Sugar, imported or when received from Pacific Coast by water and shipped to Richmond or South Richmond, Va., wharfage and handling per 100 pounds	2.75 cents.
All other freight:	
Wharfage, per 100 pounds	1 cent
Handling, per 100 pounds (Note C)	3 cents

Note A—On bulk grain, elevator charges, lawfully on file with Interstate Commerce Commission, will be in addition to the wharfage.

Note B—For absorption of wharfage and handling charges under this section which are made by the various roads, see Tariffs lawfully on file with Interstate Commerce Commission and Virginia State Corporation Commission.

Note C—In addition to the above wharfage and handling charges on lumber, not otherwise indexed by name in Official Classification, (including logs, wooden poles, wooden piling, wooden ties and pulpwood) Domestic or Foreign, received direct from vessels to cars, or from piers to cars, or received from vessels by lighters or car floats, or received from intermediate storage, when loaded into or on cars for account of the line-haul carrier, the following charges will be assessed in addition to the freight charges, and will accrue to the line-haul carrier:

	LOADING CHARGE Per ton 2,000 pounds	
	When loaded on open cars direct from vessels	When loaded on open cars or into closed cars from piers, intermediate storage or lighters
On traffic paying rate of 10 cents per 100 pounds or higher	50 cents	100 cents
On traffic paying rate of less than 10 cents per 100 pounds	#55 cents	(D) 100 cents

Combined freight and loading charges not to exceed 12½ cents per 100 pounds or $2.50 per ton 2,000 pounds.

(D) Combined freight and loading charges not to exceed 15 cents per 100 pounds or $3.00 per ton 2,000 pounds.

434

EXHIBIT No.....
WITNESS .....
PAGE No. 43

Item 910-E—Effective 1 August 1943—Cont'd.

(1) Not applicable on Import and Inbound Coastwise Lumber, Logs, Wooden Poles, Wooden Piling, Wooden Ties and Pulpwood carloads.

(2) Applicable only on Import and Inbound Coastwise traffic.

(7) Not applicable on Export and Outbound Coastwise Lumber, Wooden Poles, Wooden Piling, Wooden Ties and Pulpwood, carloads.

Item 910-D—Effective 8 June 1942.

Increased the charges in Note 1 for closed cars from 83¢ to $1.00 and open cars from 39¢ to 50¢. No change in the 55¢ charge.

Increased charge on import, coastwise and Pacific Coast woodpulp when to designated Virginia points from 1.65 cents per 100 pounds for wharfage and handling to 1¢ per 100 pounds wharfage and 3¢ per 100 pounds handling.

Item 910-C—Effective 1 December 1940.

Change in wording was published which made neither increases nor reductions in charges.

Item 910-B—Effective 15 March 1939.

Increased charges as follows:

Wharfage and handling on export tobacco, unmanufactured, from Richmond or South Richmond, Va., from 2¢ per 100 pounds to 2.1¢ per 100 pounds.

Wharfage and handling on import or Pacific Coast sugar when to Richmond or South Richmond, Va., from 2½¢ per 100 pounds to 2.75¢ per 100 pounds.

Wharfage and handling on import, coastwise and Pacific Coast woodpulp when to designated Virginia points from 1½¢ per 100 pounds to 1.65 cents per 100 pounds.

Charge on liquid caustic soda transferred to Item 915-series.

435

EXHIBIT NO. .....
WITNESS: .....
PAGE NO. 44

Item 910-A—Effective 14 January 1939.

Establish wharfage charge on liquid caustic soda which charge was later transferred to item 915-series.

Item 910—Effective 22 September 1938.

Increased the minimum line-haul rate shown in Note 1 to 10¢ (paragraph (a)) and 12¢ (paragraph (b)).

EXHIBIT NO.....
WITNESS: .....
PAGE NO. 45

EXHIBIT SHOWING THE NAMES OF TERMINAL OPERATORS AT ARMY BASE PIERS, NORFOLK, VIRGINIA WHO HAVE BEEN SHOWN IN TARIFFS OF THE FOLLOWING RAILROADS WITH REFERENCE TO WHARFAGE, HANDLING AND TERMINAL SERVICES INCLUDED IN THE LINE-HAUL RATE AND ALLOWANCES THEREFOR.

NAME OF OPERATOR	NAME OF CARRIER, TARIFF AUTHORITY AND DATES WHEN OPERATOR WAS SHOWN IN TARIFF					
	N&W	*NS*	*PRR*	*Southern*	*Virginian*	*N&PBL*
Transport Trading & Terminal Corporation	From 1 July 1940 Until 15 Sept. 1942	From 1 July 1940 Until 18 Nov. 1943	From 1 July 1940 Until present	From 1 July 1940 Until present	From 1 July 1940 Until present	From 1 July 1940 Until present
	N&W ICC 8912	NS ICC A-1055	PRR ICC 2309	Sou ICC A-11013	Vgn ICC 2084	N&PBL ICC 105
	N&W ICC 9101	NS ICC A-1148	PRR ICC 2508	Sou ICC A-10937	Vgn ICC 2196	
				Sou ICC A-10921		
				Sou ICC A-10892		
				Sou ICC A-10715		
Norfolk Tidewater Terminals, Inc.	From 20 Feb. 1926 Until 1 July 1940	From 25 Feb. 1926 Until 1 July 1940	From 15 Jan. 1926 Until 1 July 1940	From 22 May 1929 Until 1 July 1940	From 22 Dec. 1925 Until 1 July 1940	From 22 Dec. 1925 Until 1 July 1940
	N&W ICC 7604	NS ICC A-25	PRR ICC No. G.O. 14382	Sou ICC A-8699	Vgn ICC 1716	N&PBL ICC 78
	N&W ICC 8188	NS ICC A-523	PRR ICC No. G.O. 14483	Sou ICC A-10622	Vgn ICC 1719	N&PBL ICC 86
	N&W ICC 8783	NS ICC A-938	PRR ICC 34	Sou ICC A-10715	Vgn ICC 1721	N&PBL ICC 92
	N&W ICC 8912	NS ICC A-1055	PRR ICC 447		Vgn ICC 1725	N&PBL ICC 98
			PRR ICC 750		Vgn ICC 1762	N&PBL ICC 103
			PRR ICC 1149		Vgn ICC 1826	
			PRR ICC 1490		Vgn ICC 1994	N&PBL ICC 105
			PRR ICC 1910		Vgn ICC 2052	
			PRR ICC 2309		Vgn ICC 2084	

EXHIBIT NO.....
WITNESS: .....
PAGE NO. 46

NAME OF OPERATOR	NAME OF CARRIER, TARIFF AUTHORITY AND DATES WHEN OPERATOR WAS SHOWN IN TARIFF					
	N&W	*NS*	*PRR*	*Southern*	*Virginian*	*N&PBL*
Municipal Terminals	From 7 April 1921 Until 15 Nov. 1927	From 4 Nov. 1921 Until 25 Feb. 1926	From 15 April 1921 Until 15 Jan. 1926	From 25 Aug. 1921 Until 26 Dec. 1935	From 7 April 1921 Until 22 Dec. 1925	From 1 July 1923 Until 22 Dec. 1925
	N&W ICC 6789	NS ICC A-25	NYP&N ICC 3328	Sou ICC A-8699	Vgn ICC 1449	N&PBL ICC 69
	N&W ICC 7020		PRR ICC No. G.O. 11713		Vgn ICC 1465	
	N&W ICC 7604		PRR ICC No. G.O. 14285		Vgn ICC 1536	
					Vgn ICC 1599	
					Vgn ICC 1606	
					Vgn ICC 1688	

Statement of Class Rates and Distances Between 106 Base Points Resulting from I. C. C. Docket 15879 and the Ports of New York, Philadelphia, Baltimore, Albany, Norfolk and Boston Rates in Ce

	BETWEEN	NEW YORK, N. Y.						PHILADELPHIA, PA.						BALTIMORE, MD.						ALBANY, N. Y.					
		CLASSES						CLASSES						CLASSES						CLASSES					
	AND	Miles	1	2	3	4	5	6	Miles	1	2	3	4	5	6	Miles	1	2	3	4	5	6	Miles	1	2	3	4	5	6
1	Akron, Ohio	550							475							429							499						
2	Domestic		128	109	90	64	45	35		118	100	82	59	41	32		112	95	78	56	39	31		120	102	84	60	42	33
3	Import, Intercoastal and Coastwise		120	107	81	59	42	34		111	97	79	57	40	32		112	95	78	56	39	31		114	97	79	57	40	32
4	Export, Intercoastal and Coastwise		135	98	81	59	42	34		113	96	79	57	40	32		112	95	78	56	39	31		113	96	79	57	40	32
5	Alpena, Mich.	811							817							845							698						
6	Domestic		166	141	116	83	58	46		166	141	116	83	58	46		166	141	116	83	58	46		152	129	106	76	53	42
7	Import, Intercoastal and Coastwise		166	141	116	83	58	46		160	135	114	81	56	44		158	133	113	80	55	43		152	129	106	76	53	42
8	Export, Intercoastal and Coastwise		166	141	116	83	58	46		164	139	114	81	56	44		163	138	113	80	55	43		152	129	106	76	53	42
9	Ann Arbor, Mich.	668							640							593							559						
10	Domestic		142	121	99	71	50	39		138	117	97	69	48	38		133	113	93	67	47	37		130	111	91	65	46	36
11	Import, Intercoastal and Coastwise		141	121	96	70	50	39		135	115	94	68	48	37		133	113	93	67	47	36		130	111	91	65	46	36
12	Export, Intercoastal and Coastwise		136	116	96	70	50	39		134	114	94	68	48	37		133	113	93	67	47	36		130	111	91	65	46	36
13	Ashtabula, Ohio	513							450							429							414						
14	Domestic		122	104	85	61	43	34		112	95	78	56	39	31		112	95	78	56	39	31		109	93	76	55	38	30
15	Import, Intercoastal and Coastwise		118	101	80	58	41	33		112	95	78	56	39	31		110	93	77	55	38	30		109	93	76	55	38	30
16	Export, Intercoastal and Coastwise		114	97	80	58	41	33		112	95	78	56	39	31		111	94	77	55	38	30		112	95	78	56	39	31
17	Aurora, Ill.	923							847							800							825						
18	Domestic		171	145	120	86	60	47		164	139	115	82	57	45		158	134	111	79	55	43		156	133	109	78	55	43
19	Import, Intercoastal and Coastwise		166	142	114	82	58	46		160	136	112	80	56	44		158	134	111	79	55	43		156	133	109	78	55	43
20	Export, Intercoastal and Coastwise		161	137	114	82	58	46		159	135	112	80	56	44		158	134	111	79	55	43		156	133	109	78	55	43
21	Big Rapids, Mich.	775							781							748							662						
22	Domestic		158	134	111	79	55	43		158	134	111	79	55	43		155	132	108	78	54	43		144	122	101	72	50	40
23	Import, Intercoastal and Coastwise		158	134	111	79	55	43		152	128	109	77	53	41		150	126	108	76	52	40		144	122	101	72	50	40
24	Export, Intercoastal and Coastwise		158	134	111	79	55	43		156	132	109	77	53	41		155	131	108	76	52	40		144	122	101	72	50	40
25	Bloomington, Ill.	957							881							815							872						
26	Domestic		174	148	122	87	61	48		166	141	116	83	58	46		158	134	111	79	55	43		163	139	114	82	56	45
27	Import, Intercoastal and Coastwise		166	142	114	82	58	46		160	136	112	80	56	44		158	134	111	79	55	43		160	136	112	80	56	44
28	Export, Intercoastal and Coastwise		161	137	114	82	58	46		159	135	112	80	56	44		158	134	111	79	55	43		159	135	112	80	56	44
29	Bloomington, Ind.	848							772							699							804						
30	Domestic		162	138	113	81	57	45		155	132	109	78	54	43		146	124	102	73	51	40		153	130	107	77	54	42
31	Import, Intercoastal and Coastwise		154	132	105	76	54	43		148	126	103	74	52	41		146	124	102	73	51	40		148	126	103	74	52	41
32	Export, Intercoastal and Coastwise		149	127	105	76	54	43		147	125	103	74	52	41		146	124	102	73	51	40		147	125	103	74	52	41
33	Burlington, Iowa	1073							997							941							984						
34	Domestic		188	160	132	94	66	52		180	153	126	90	63	50		174	148	122	87	61	48		177	150	124	89	62	49
35	Import, Intercoastal and Coastwise		182	156	125	90	64	51		176	150	123	88	62	49		174	148	122	87	61	48		176	150	123	88	62	49
36	Export, Intercoastal and Coastwise		177	151	125	90	64	51		175	149	123	88	62	49		174	148	122	87	61	48		175	149	123	88	62	49
37	Cadillac, Mich.	781							787							775							668						
38	Domestic		161	137	113	81	56	44		161	137	113	81	56	44		161	137	113	81	56	44		146	124	102	73	51	40
39	Import, Intercoastal and Coastwise		161	137	113	81	56	44		155	131	111	79	54	42		153	129	110	78	53	41		146	124	102	73	51	40
40	Export, Intercoastal and Coastwise		161	137	113	81	56	44		159	135	111	79	54	43		158	134	110	78	53	41		146	124	102	73	51	40
41	Cairo, Ill.	1071							991							907							1026						
42	Domestic		189	161	132	95	66	52		182	155	127	91	64	50		172	146	120	86	60	47		182	155	127	91	64	50
43	Import, Intercoastal and Coastwise		180	154	126	89	63	50		174	148	121	87	61	48		172	146	120	86	60	47		174	148	121	87	61	48
44	Export, Intercoastal and Coastwise		175	149	123	89	63	50		173	147	121	87	61	48		172	146	120	86	60	47		173	147	121	87	61	48
45	Cambridge, Ohio	549							472							411							576						
46	Domestic		128	109	90	64	45	35		119	101	83	60	42	33		109	93	76	55	38	30		129	110	90	65	45	35
47	Import, Intercoastal and Coastwise		117	100	79	58	41	33		111	95	77	56	39	31		109	93	76	55	38	30		111	95	77	56	39	31
48	Export, Intercoastal and Coastwise		112	96	79	58	41	33		110	94	77	56	39	31		109	93	76	55	38	30		110	94	77	56	39	31
49	Canton, Ohio	536							460							413							507						
50	Domestic		124	105	87	62	43	34		114	97	80	57	40	31		109	93	76	55	38	30		120	102	84	60	42	33
51	Import, Intercoastal and Coastwise		117	101	79	58	41	33		111	95	77	56	39	31		109	93	76	55	38	30		111	95	77	56	39	31
52	Export, Intercoastal and Coastwise		112	96	79	58	41	33		110	94	77	56	39	31		109	93	76	55	38	30		110	94	77	56	39	31
53	Centralia, Ill.	592							516							441							942						
54	Domestic		180	153	126	90	63	50		173	147	121	87	61	48		163	139	114	82	57	45		171	145	120	86	60	47
55	Import, Intercoastal and Coastwise		171	147	117	85	60	48		165	141	115	83	58	46		163	139	114	82	57	45		165	141	115	83	58	46
56	Export, Intercoastal and Coastwise		166	142	117	85	60	48		164	140	115	83	58	46		163	139	114	82	57	45		164	140	115	83	58	46
57	Champaign, Ill.	813							837							768							813						
58	Domestic		171	145	120	86	60	47		163	139	114	82	57	45		154	131	108	77	54	42		160	136	112	80	56	44
59	Import, Intercoastal and Coastwise		162	138	111	80	57	45		156	133	109	78	55	43		154	131	108	77	54	42		156	133	109	78	55	43
60	Export, Intercoastal and Coastwise		157	134	111	80	57	45		155	132	109	78	55	43		154	131	108	77	54	42		155	132	109	78	55	43

439

Distances Between 106 Base Points Resulting from I. C. C. Docket 15879 Eastern Class Rate Case York, Philadelphia, Baltimore, Albany, Norfolk and Boston Rates in Cents Per 100 Pounds . .

Exhibit No. 8
Witness: HOPKINSON
I. C. C. Docket No. 29117
Page 1 of 7 Pages

	PHILADELPHIA, PA.						BALTIMORE, MD.						ALBANY, N. Y.						NORFOLK, VA.						BOSTON, MASS.					
	CLASSES						CLASSES						CLASSES						CLASSES						CLASSES					
	6	Miles	1	2	3	4	5	6	Miles	1	2	3	4	5	6	Miles	1	2	3	4	5	6	Miles	1	2	3	4	5	6	Miles	1	2	3	4	5	6
35		475							429							499							621							585						
34			118	100	82	59	41	32		112	95	78	56	39	31		120	102	84	60	42	33		135	115	95	68	47	37		139	118	97	70	49	38
34			114	97	79	57	40	32		112	95	78	56	39	31		114	97	79	57	40	32		125	106	88	63	44	34		120	103	81	59	42	34
34			113	96	79	57	40	32		112	95	78	56	39	31		113	96	79	57	40	32		125	106	88	63	44	34		115	98	81	59	42	34
46		817							815							698							1013							882						
46			166	141	116	83	58	46		166	141	116	83	58	46		152	129	106	76	53	42		187	159	131	94	65	51		168	143	118	84	59	46
46			166	141	116	83	58	46		158	133	113	80	55	43		152	129	106	76	53	42		158	133	109	80	55	43		166	141	116	83	58	46
46			164	139	114	81	56	44		163	138	113	80	55	43		152	129	106	76	53	42		163	138	113	80	55	43		166	141	116	83	58	46
39		640							593							559							785							745						
39			138	117	97	69	48	38		133	113	93	67	47	37		130	111	91	65	46	36		157	133	110	79	55	43		147	125	103	74	51	40
39			135	115	94	68	48	37		133	113	93	67	47	36		130	111	91	65	46	36		133	113	93	67	47	36		141	121	99	70	50	39
39			134	114	94	68	48	37		133	113	93	67	47	36		130	111	91	65	46	36		133	113	93	67	47	36		136	116	96	70	50	39
34		450							429							414							628							585						
34			112	95	78	56	39	31		112	95	78	56	39	31		109	93	76	55	38	30		135	115	95	68	47	37		129	110	90	65	45	35
33			112	95	78	56	39	31		110	93	77	55	38	30		109	93	76	55	38	30		135	115	95	68	47	37		118	101	80	58	41	33
33			112	95	78	56	39	31		111	94	77	55	38	30		109	93	76	55	38	30		135	115	95	68	47	37		114	97	80	58	41	33
47		847							800							825							944							1005						
47			164	139	115	82	57	45		158	134	111	79	55	43		156	133	109	78	55	43		171	145	120	86	60	47		173	147	121	87	61	48
46			160	136	112	80	56	44		158	134	111	79	55	43		156	133	109	78	55	43		158	134	111	79	55	43		166	142	114	82	58	46
46			159	135	112	80	56	44		158	134	111	79	55	43		156	133	109	78	55	43		158	134	111	79	55	43		161	137	114	82	58	46
43		781							748							662							940							846						
43			158	134	111	79	55	43		155	132	108	78	54	43		144	122	101	72	50	40		176	150	123	88	62	48		168	138	113	81	57	45
43			152	128	109	77	53	41		150	126	108	76	52	40		144	122	101	72	50	40		150	126	108	76	52	40		158	134	111	79	55	43
43			156	132	109	77	53	41		155	131	108	76	52	40		144	122	101	72	50	40		155	131	108	76	52	40		158	134	111	79	55	43
48		881							815							872							933							1168						
48			166	141	116	83	58	46		158	134	111	79	55	43		163	139	114	82	56	45		169	144	118	85	59	46		179	152	125	90	63	49
46			160	136	112	80	56	44		158	134	111	79	55	43		160	136	112	80	56	44		168	142	114	82	58	46		166	142	114	82	58	46
46			159	135	112	80	56	44		158	134	111	79	55	43		159	135	112	80	56	44		158	134	111	79	55	43		161	137	114	82	58	46
45		772							699							804							800							588						
45			155	132	109	78	54	43		146	124	102	73	51	40		153	130	107	77	54	42		157	133	110	79	55	43		169	144	118	85	59	46
43			148	126	103	74	52	41		146	124	102	73	51	40		148	126	103	74	52	41		146	124	102	73	51	40		153	132	108	76	54	43
43			147	125	103	74	52	41		146	124	102	73	51	40		147	125	103	74	52	41		146	124	102	73	51	40		149	127	105	76	54	43
52		997							941							884							1063							1168						
52			180	153	126	90	63	50		174	148	122	87	61	48		177	150	124	89	62	49		184	156	129	92	64	51		194	165	136	97	68	53
51			176	150	123	88	62	49		174	148	122	87	61	48		176	150	123	88	62	49		174	148	122	87	61	48		182	156	125	90	64	51
51			175	149	123	88	62	49		174	148	122	87	61	48		175	149	123	88	62	49		174	148	122	87	61	48		175	151	125	90	64	51
44		787							775							668							967							852						
44			161	137	113	81	56	44		161	137	113	81	56	44		146	124	102	73	51	40		180	153	126	90	63	50		163	139	114	82	57	45
44			155	131	111	79	54	42		153	129	110	78	53	41		146	124	102	73	51	40		153	129	110	78	53	41		161	137	113	81	56	44
44			155	131	111	79	54	42		158	134	110	78	53	41		146	124	102	73	51	40		158	134	110	78	53	41		161	137	113	81	56	44
52		991							907							1026							1032							1210						
52			182	155	127	91	64	50		172	146	120	86	60	47		182	155	127	91	64	50		178	151	125	88	62	49		188	168	139	99	69	54
50			174	148	121	87	61	48		172	146	120	86	60	47		174	148	121	87	61	48		172	146	120	86	60	47		175	149	123	89	63	50
50			172	146	121	87	61	48		172	146	120	86	60	47		173	147	121	87	61	48		172	146	120	86	60	47		175	149	123	89	63	50
35		473							411							576							602							760						
35			119	101	83	60	42	33		109	93	76	55	38	30		129	110	90	65	45	35		132	112	92	66	46	36		146	124	102	73	51	40
33			111	95	77	56	39	31		109	93	76	55	38	30		111	95	77	56	39	31		125	106	88	63	44	34		117	101	79	58	41	33
33			110	94	77	56	39	31		109	93	76	55	38	30		110	94	77	56	39	31		125	106	88	63	44	34		112	96	79	58	41	33
46		460							413							507							605							691						
34			114	97	80	57	40	31		109	93	76	55	38	30		120	102	84	60	42	33		132	112	92	66	46	36		170	144	118	85	59	46
32			111	95	77	56	39	31		109	93	76	55	38	30		111	95	77	56	39	31		125	106	88	63	44	34		117	101	79	58	41	33
32			110	94	77	56	39	31		109	93	76	55	38	30		110	94	77	56	39	31		125	106	88	63	44	34		112	96	79	58	41	33
50		916							841							942							938							1126						
50			173	147	121	87	61	48		163	139	114	82	57	45		171	145	120	86	60	47		172	146	120	86	60	47		187	159	131	94	65	51
48			165	141	115	83	58	46		163	139	114	82	57	45		165	141	115	83	58	46		165	141	115	83	58	46		171	147	117	85	60	48
48			164	140	115	83	58	46		163	139	114	82	57	45		164	140	115	83	58	46		163	139	114	82	57	45		166	142	117	85	60	48
47		837							768							813							885							1027						
47			163	139	114	82	57	45		154	131	108	77	54	42		160	136	112	80	56	44		165	140	116	83	58	45		178	150	123	88	62	48
45			156	133	109	78	55	43		154	131	108	77	54	42		156	133	109	78	55	43		154	131	108	77	54	42		162	139	111	80	57	45
45			155	132	109	78	55	43		154	131	108	77	54	42		156	133	109	78	55	43		154	131	108	77	54	42		157	134	111	80	57	45

Item	BETWEEN AND	NEW YORK, N. Y. CLASSES 1 2 3 4 5 6	Miles	PHILADELPHIA, PA. CLASSES 1 2 3 4 5 6	Miles	BALTIMORE, MD. CLASSES 1 2 3 4 5 6	Miles	ALBANY, N. Y. CLASSES 1 2 3 4 5 6	Miles
1	Cheboygan ..... Mich.	852			858		856		739
2	Domestic	174 148 122 87 61 48		174 148 122 87 61 48		174 148 122 87 61 48		160 136 112 80 56 44	
3	Import, Intercoastal and Coastwise	174 148 122 87 61 48		168 142 120 85 58 46		166 140 119 84 58 45		160 136 112 80 56 44	
4	Export, Intercoastal and Coastwise	174 148 122 87 61 48		172 146 120 85 59 46		171 145 119 84 58 45		160 136 112 80 56 44	
5	Chester ..... Ill.	1060	982		988		899		1011
6	Domestic	187 159 131 94 65 51		179 152 125 90 63 49		171 145 120 86 60 47		179 152 125 90 63 49	
7	Import, Intercoastal and Coastwise	179 153 123 89 62 50		173 147 121 87 61 48		171 145 120 86 60 47		173 147 121 87 61 48	
8	Export, Intercoastal and Coastwise	174 148 123 89 62 50		172 146 121 87 61 48		171 145 120 86 60 47		172 146 121 87 61 48	
9	Chicago ..... Ill.	890	814		789		767		814
10	Domestic	167 142 117 84 58 46		160 136 112 80 56 44		154 131 108 77 54 42		153 130 107 77 54 42	
11	Import, Intercoastal and Coastwise	162 139 111 80 57 45		156 132 109 78 55 43		154 131 108 77 54 42		153 130 107 77 54 42	
12	Export, Intercoastal and Coastwise	157 134 111 80 57 45		155 132 109 78 55 43		154 131 108 77 54 42		153 130 107 77 54 42	
13	Chillicothe ..... Ohio	628	548		624		464		548
14	Domestic	135 115 95 68 47 37		127 108 89 64 44 35		114 97 80 57 40 31		138 117 97 69 48 38	
15	Import, Intercoastal and Coastwise	122 102 83 60 43 34		116 99 81 58 41 32		114 97 80 57 40 31		116 98 81 58 41 32	
16	Export, Intercoastal and Coastwise	117 100 83 60 43 34		115 98 81 58 41 32		114 97 80 57 40 31		115 98 81 58 41 32	
17	Cincinnati ..... Ohio	724	644		707		560		644
18	Domestic	150 128 105 75 53 41		140 119 98 70 49 39		128 109 90 64 45 35		145 123 102 73 51 40	
19	Import, Intercoastal and Coastwise	136 117 93 67 48 38		130 111 91 65 46 36		128 109 90 64 45 35		145 123 102 73 51 40	
20	Export, Intercoastal and Coastwise	131 112 93 67 48 38		129 110 91 65 46 36		128 109 90 64 45 35		145 123 102 73 51 40	
21	Clare ..... Mich.	732	738		620		727		738
22	Domestic	154 131 108 77 54 42		154 131 108 77 54 42		154 131 108 77 54 42		140 119 98 70 49 39	
23	Import, Intercoastal and Coastwise	154 131 108 77 54 42		148 125 106 75 52 40		146 123 105 74 51 39		140 119 98 70 49 39	
24	Export, Intercoastal and Coastwise	154 131 108 77 54 42		152 129 106 75 52 40		151 128 105 74 51 39		140 119 98 70 49 39	
25	Cleveland ..... Ohio	562	490		468		444		468
26	Domestic	128 109 90 64 45 35		118 100 83 59 41 32		112 95 78 56 39 31		116 99 81 58 41 32	
27	Import, Intercoastal and Coastwise	120 103 81 59 42 34		114 97 79 57 40 32		112 95 78 56 39 31		114 97 79 57 40 32	
28	Export, Intercoastal and Coastwise	115 98 81 59 42 34		113 96 79 57 40 32		112 95 78 56 39 31		113 96 79 57 40 32	
29	Clifford ..... Mich.	642	648		529		646		648
30	Domestic	141 120 99 71 49 39		141 120 99 71 49 39		141 120 99 71 49 39		128 109 90 64 45 35	
31	Import, Intercoastal and Coastwise	141 120 99 71 49 39		135 114 97 69 47 37		133 112 96 68 46 36		128 109 90 64 45 35	
32	Export, Intercoastal and Coastwise	141 120 99 71 49 39		139 118 97 69 47 37		138 117 96 68 47 36		128 109 90 64 45 35	
33	Clinton ..... Iowa	1022	951		926		904		951
34	Domestic	184 156 129 92 64 51		176 150 123 88 62 48		171 145 120 86 60 47		173 147 121 87 61 48	
35	Import, Intercoastal and Coastwise	179 153 123 89 62 50		173 147 121 87 61 48		171 145 120 86 60 47		173 147 121 87 61 48	
36	Export, Intercoastal and Coastwise	174 148 123 89 63 50		172 146 121 87 61 48		171 145 120 86 60 47		172 146 121 87 61 48	
37	Columbus ..... Ohio	621	545		606		479		546
38	Domestic	135 115 95 68 47 37		127 108 89 64 44 35		117 99 82 59 41 32		132 112 92 66 46 36	
39	Import, Intercoastal and Coastwise	125 107 85 62 44 35		119 101 83 60 42 33		117 99 82 59 41 32		119 101 83 60 42 33	
40	Export, Intercoastal and Coastwise	120 102 85 62 44 35		118 100 83 60 42 33		117 99 82 59 41 32		118 100 83 60 42 33	
41	Danville ..... Ill.	879	802		810		735		502
42	Domestic	167 142 117 84 58 46		160 136 112 80 56 44		151 128 106 76 53 42		156 133 109 78 55 43	
43	Import, Intercoastal and Coastwise	159 136 109 79 56 45		153 130 107 77 54 43		151 128 106 76 53 42		153 130 107 77 54 43	
44	Export, Intercoastal and Coastwise	154 131 109 79 56 45		152 129 107 77 54 43		151 128 106 76 53 42		152 129 107 77 54 43	
45	Dayton ..... Ohio	690	614		652		541		614
46	Domestic	145 123 102 73 51 40		136 116 95 68 48 37		125 106 88 63 44 34		139 118 97 70 49 39	
47	Import, Intercoastal and Coastwise	133 114 94 66 47 37		127 108 89 64 45 35		125 106 88 63 44 34		127 108 89 64 45 35	
48	Export, Intercoastal and Coastwise	128 109 91 66 47 37		126 107 89 64 45 35		125 106 88 63 44 34		126 107 89 64 45 35	
49	Decatur ..... Ill.	952	876		884		803		876
50	Domestic	174 148 122 87 61 48		166 141 116 83 58 46		158 134 111 79 55 43		162 139 114 82 57 45	
51	Import, Intercoastal and Coastwise	166 142 114 82 58 46		160 136 112 80 56 44		158 134 111 79 55 43		158 135 112 80 56 44	
52	Export, Intercoastal and Coastwise	161 137 114 82 58 46		159 135 112 80 56 44		158 134 111 79 55 43		158 135 112 80 56 44	
53	Defiance ..... Ohio	705	629		615		582		629
54	Domestic	143 122 100 72 50 39		138 117 97 69 48 38		132 112 92 66 46 36		133 113 93 67 47 37	
55	Import, Intercoastal and Coastwise	140 120 98 69 49 38		134 114 95 67 47 37		132 112 92 66 46 36		133 113 93 67 47 37	
56	Export, Intercoastal and Coastwise	135 115 95 68 47 37		133 113 93 67 47 37		132 112 92 66 46 36		133 113 93 67 47 37	
57	Detroit ..... Mich.	621	637		522		604		637
58	Domestic	135 115 95 68 47 37		125 106 88 63 44 34		132 112 92 66 46 36		125 106 88 63 44 34	
59	Import, Intercoastal and Coastwise	135 115 95 68 47 37		129 109 91 66 45 35		132 112 92 65 44 34		125 106 88 63 44 34	
60	Export, Intercoastal and Coastwise	135 115 95 68 47 37		133 113 93 66 45 35		132 112 92 65 44 34		125 106 88 63 44 34	
61	Dubuque ..... Iowa	1052	986		952		929		986
62	Domestic	187 159 131 94 65 51		179 152 125 90 63 49		174 148 122 87 61 48		176 150 123 88 62 48	
63	Import, Intercoastal and Coastwise	182 156 129 93 64 51		176 150 123 88 62 49		174 148 122 87 61 48		176 150 123 88 62 48	
64	Export, Intercoastal and Coastwise	177 151 125 90 64 51		175 149 123 88 62 49		174 148 122 87 61 48		175 149 123 88 62 48	
65	Eldorado ..... Ill.	994	914		949		830		914
66	Domestic	180 153 126 90 63 50		173 147 121 87 61 48		163 139 114 82 57 45		171 145 120 86 60 47	
67	Import, Intercoastal and Coastwise	171 147 117 85 60 48		165 114 115 83 58 46		163 139 114 82 57 45		165 141 115 83 58 46	
68	Export, Intercoastal and Coastwise	166 142 117 85 60 48		164 140 115 83 58 46		163 139 114 82 57 45		164 140 115 83 58 46	

Item	BETWEEN AND	NEW YORK, N. Y. CLASSES 1 2 3 4 5 6	Miles	PHILADELPHIA, PA. CLASSES 1 2 3 4 5 6	Miles	BALTIMORE, MD. CLASSES 1 2 3 4 5 6	Miles	ALBANY, N. Y. CLASSES 1 2 3 4 5 6	Miles	NORFOLK, VA. CLASSES 1 2 3 4 5 6	Miles	BOSTON, MASS. CLASSES 1 2 3 4 5 6
1	Cheboygan ..... Mich.				858		856		739		1053	
2	Domestic			174 148 122 87 61 48		174 148 122 87 61 48		160 136 112 80 56 44		195 166 137 98 68 54		176 150 123 87 61 48
3	Import, Intercoastal and Coastwise			168 142 120 85 58 46		166 140 119 84 58 45		160 136 112 80 56 44		166 140 116 84 58 45		174 148 122 87 61 48
4	Export, Intercoastal and Coastwise			172 146 120 85 59 46		171 145 119 84 58 45		160 136 112 80 56 44		171 145 119 84 58 45		174 148 122 87 61 48
5	Chester ..... Ill.		982		988		899		1011		997	
6	Domestic			179 152 125 90 63 49		171 145 120 86 60 47		179 152 125 90 63 49		196 167 137 98 69 54		196 167 137 98 69 54
7	Import, Intercoastal and Coastwise			173 147 121 87 61 48		171 145 120 86 60 47		173 147 121 87 61 48		171 145 120 86 60 47		179 153 123 89 63 50
8	Export, Intercoastal and Coastwise			172 146 121 87 61 48		171 145 120 86 60 47		172 146 121 87 61 48		171 145 120 86 60 47		174 148 123 89 63 50
9	Chicago ..... Ill.		814		789		767		814		914	
10	Domestic			153 130 107 77 54 42		154 131 108 77 54 42		160 136 112 80 56 44		166 141 116 82 58 46		169 144 118 85 59 46
11	Import, Intercoastal and Coastwise			153 130 107 77 54 42		154 131 108 77 54 42		156 133 109 78 55 43		154 131 108 77 54 42		162 139 111 80 57 45
12	Export, Intercoastal and Coastwise			153 130 107 77 54 42		154 131 108 77 54 42		155 132 109 78 55 43		154 131 108 77 54 42		157 134 111 80 57 45
13	Chillicothe ..... Ohio		548		624		464		548		654	
14	Domestic			138 117 97 69 48 38		114 97 80 57 40 31		127 108 89 64 44 35		138 117 97 69 48 38		154 131 108 77 54 42
15	Import, Intercoastal and Coastwise			116 99 81 58 41 32		114 97 80 57 40 31		116 98 81 58 41 32		116 99 81 58 41 32		122 105 85 60 43 34
16	Export, Intercoastal and Coastwise			115 98 81 58 41 32		114 97 80 57 40 31		115 98 81 58 41 32		115 98 81 58 41 32		117 100 82 60 43 34
17	Cincinnati ..... Ohio		644		707		560		644		657	
18	Domestic			145 123 102 73 51 40		128 109 90 64 45 35		140 119 98 70 49 39		140 119 98 70 49 39		163 139 114 82 57 45
19	Import, Intercoastal and Coastwise			130 111 91 65 46 36		128 109 90 64 45 35		128 109 90 64 45 35		128 109 90 64 45 35		128 109 90 64 45 35
20	Export, Intercoastal and Coastwise			129 110 91 65 46 36		128 109 90 64 45 35		128 109 90 64 45 35		128 109 90 64 45 35		131 112 93 67 48 38
21	Clare ..... Mich.		738		620		727		738		919	
22	Domestic			154 131 108 77 54 42		154 131 108 77 54 42		140 119 98 70 49 39		154 131 108 77 54 42		175 149 123 88 61 48
23	Import, Intercoastal and Coastwise			148 125 106 75 52 40		146 123 105 74 51 39		140 119 98 70 49 39		146 123 105 74 51 39		159 131 108 77 54 42
24	Export, Intercoastal and Coastwise			152 129 106 75 52 40		151 128 105 74 51 39		140 119 98 70 49 39		151 128 105 74 51 39		154 131 108 77 54 42
25	Cleveland ..... Ohio		490		468		444		468		636	
26	Domestic			118 100 83 59 41 32		112 95 78 56 39 31		116 99 81 58 41 32		116 99 81 58 41 32		135 115 95 68 47 37
27	Import, Intercoastal and Coastwise			114 97 79 57 40 32		112 95 78 56 39 31		114 97 79 57 40 32		114 97 79 57 40 32		135 115 95 68 47 37
28	Export, Intercoastal and Coastwise			113 96 79 57 40 32		112 95 78 56 39 31		113 96 79 57 40 32		112 95 78 56 39 31		135 115 95 68 47 37
29	Clifford ..... Mich.		648		529		646		648		861	
30	Domestic			141 120 99 71 49 39		141 120 99 71 49 39		128 109 90 64 45 35		141 120 99 71 49 39		165 140 116 83 58 46
31	Import, Intercoastal and Coastwise			133 112 96 68 46 36		133 112 96 68 46 36		128 109 90 64 45 35		133 112 96 68 46 36		141 120 99 71 49 39
32	Export, Intercoastal and Coastwise			138 117 96 68 47 36		138 117 96 68 47 36		128 109 90 64 45 35		138 117 96 68 47 36		148 126 99 71 49 39
33	Clinton ..... Iowa		951		926		904		951		1040	
34	Domestic			171 145 120 86 60 47		171 145 120 86 60 47		173 147 121 87 61 48		171 145 120 86 60 47		183 156 128 92 64 50
35	Import, Intercoastal and Coastwise			171 145 120 86 60 47		171 145 120 86 60 47		173 147 121 87 61 48		171 145 120 86 60 47		179 153 123 89 63 50
36	Export, Intercoastal and Coastwise			171 145 120 86 60 47		171 145 120 86 60 47		172 146 121 87 61 48		171 145 120 86 60 47		174 148 123 89 63 50
37	Columbus ..... Ohio		606		546		479		606		790	
38	Domestic			132 112 92 66 46 36		117 99 82 59 41 32		127 108 89 64 44 35		132 112 92 66 46 36		135 115 95 68 47 37
39	Import, Intercoastal and Coastwise			119 101 83 60 42 33		117 99 82 59 41 32		119 101 83 60 42 33		119 101 83 60 42 33		162 129 106 76 53 42
40	Export, Intercoastal and Coastwise			118 100 83 60 42 33		117 99 82 59 41 32		118 100 83 60 42 33		118 100 83 60 42 33		125 106 87 62 44 35
41	Danville ..... Ill.		810		502		735		502		852	
42	Domestic			156 133 109 78 55 43		151 128 106 76 53 42		160 136 112 80 56 44		151 128 106 76 53 42		163 139 114 82 57 45
43	Import, Intercoastal and Coastwise			153 130 107 77 54 43		151 128 106 76 53 42		153 130 107 77 54 43		151 128 106 76 53 42		153 130 107 77 54 43
44	Export, Intercoastal and Coastwise			152 129 107 77 54 43		151 128 106 76 53 42		152 129 107 77 54 43		151 128 106 76 53 42		154 131 109 79 56 45
45	Dayton ..... Ohio		614		652		541		614		665	
46	Domestic			136 116 95 68 48 37		125 106 88 63 44 34		139 118 97 70 49 39		125 106 88 63 44 34		140 119 98 70 49 39
47	Import, Intercoastal and Coastwise			127 108 89 64 45 35		125 106 88 63 44 34		127 108 89 64 45 35		125 106 88 63 44 34		133 114 94 66 47 37
48	Export, Intercoastal and Coastwise			126 107 89 64 45 35		125 106 88 63 44 34		126 107 89 64 45 35		125 106 88 63 44 34		125 106 88 63 44 34
49	Decatur ..... Ill.		876		884		803		876		920	
50	Domestic			166 141 116 83 58 46		158 134 111 79 55 43		162 139 114 82 57 45		166 142 116 83 58 46		169 144 118 85 59 46
51	Import, Intercoastal and Coastwise			160 136 112 80 56 44		158 134 111 79 55 43		158 135 112 80 56 44		158 134 111 79 55 43		166 142 116 82 58 46
52	Export, Intercoastal and Coastwise			159 135 112 80 56 44		158 134 111 79 55 43		158 135 112 80 56 44		158 134 111 79 55 43		161 137 114 82 58 46
53	Defiance ..... Ohio		629		615		582		629		762	
54	Domestic			138 117 97 69 48 38		132 112 92 66 46 36		133 113 93 67 47 37		132 112 92 66 46 36		154 131 108 77 55 42
55	Import, Intercoastal and Coastwise			134 114 95 67 47 37		132 112 92 66 46 36		133 113 93 67 47 37		132 112 92 66 46 36		140 119 98 69 49 38
56	Export, Intercoastal and Coastwise			133 113 93 67 47 37		132 112 92 66 46 36		133 113 93 67 47 37		132 112 92 66 46 36		135 115 95 69 48 38
57	Detroit ..... Mich.		637		522		604		637		796	
58	Domestic			125 106 88 63 44 34		132 112 92 66 46 36		125 106 88 63 44 34		125 106 88 63 44 34		143 122 100 72 50 39
59	Import, Intercoastal and Coastwise			127 107 92 65 44 34		132 112 92 65 44 34		125 106 88 63 44 34		125 106 88 63 44 34		135 115 95 68 47 37
60	Export, Intercoastal and Coastwise			125 106 88 63 44 34		132 112 92 65 44 34		125 106 88 63 44 34		125 106 88 63 44 34		135 115 95 68 47 37
61	Dubuque ..... Iowa		986		952		929		986		1085	
62	Domestic			176 150 123 88 62 48		174 148 122 87 61 48		179 152 125 90 63 49		174 148 122 87 61 48		186 158 130 93 65 51
63	Import, Intercoastal and Coastwise			176 150 123 88 62 49		174 148 122 87 61 48		176 150 123 88 62 49		174 148 122 87 61 48		182 156 129 92 64 51
64	Export, Intercoastal and Coastwise			175 149 123 88 62 49		174 148 122 87 61 48		175 149 123 88 62 49		174 148 122 87 61 48		174 148 122 87 61 48
65	Eldorado ..... Ill.		914		949		830		914		927	
66	Domestic			173 147 121 87 61 48		163 139 114 82 57 45		173 147 121 87 61 48		163 135 114 82 57 45		172 146 120 86 60 47
67	Import, Intercoastal and Coastwise			165 141 115 83 58 46		163 139 114 82 57 45		165 141 115 83 58 46		163 139 114 82 57 45		163 139 114 82 57 45
68	Export, Intercoastal and Coastwise			164 140 115 83 58 46		163 139 114 82 57 45		164 140 115 83 58 46		163 139 114 82 57 45		166 142 117 85 60 48

Item	FROM	TO	Miles	NEW YORK, N. Y. CLASSES 1	2	3	4	5	6	Miles	PHILADELPHIA, PA. CLASSES 1	2	3	4	5	6	Miles	BALTIMORE, MD. CLASSES 1	2	3	4	5	6	Miles	NORFOLK, VA. CLASSES 1	2	3	4	5	6	Miles	ALBANY, N. Y. CLASSES 1	2	3	4	5	6	Miles	NORFOLK, VA. CLASSES 1	2	3	4	5	6	Miles	BOSTON, MASS. CLASSES 1	2	3	4	5	6
1	Evansville	Ind.	951							871							787							884							918							1102						
2		1 mestic		176	150	123	88	52	48		166	141	116	83	58	46		163	139	114	82	57	45		163	139	114	82	57	45		167	142	117	84	58	46		184	156	129	92	64	51
3		Import, Intercoastal and Coastwise		166	142	114	82	58	46		160	136	112	80	56	44		158	134	111	79	55	43		158	134	111	79	55	43		160	136	112	80	56	44		158	134	111	79	55	43		166	142	114	82	58	46
4		Export, Intercoastal and Coastwise		161	137	114	82	58	46		159	135	112	80	56	44		158	134	111	79	55	43		159	135	112	80	56	44		159	135	112	80	56	44		158	134	111	79	55	43		161	137	114	82	58	46
5	Flint	Mich.	657							662							650							842							545							729						
6		Domestic		142	121	99	71	50	39		140	119	98	70	49	39		140	119	98	70	49	39		140	119	98	70	49	39		128	109	90	64	45	35		162	138	113	81	57	45		145	123	102	73	51	40
7		Import, Intercoastal and Coastwise		142	121	99	71	50	39		136	115	97	69	48	37		134	113	96	68	47	36		136	115	97	69	48	37		128	109	90	64	45	35		134	113	96	68	47	36		142	121	99	71	50	39
8		Export, Intercoastal and Coastwise		142	121	99	71	50	39		140	119	97	69	48	37		139	118	96	68	47	36		140	119	98	70	49	39		128	109	90	64	45	35		139	118	96	68	47	36		142	121	99	71	50	39
9	Flora	Ill.	966							886							802							900							921							1105						
10		Domestic		176	150	123	88	52	48		168	143	118	84	59	46		168	143	118	84	59	46		168	143	118	84	59	46		167	142	117	84	58	46		184	156	129	92	64	51
11		Import, Intercoastal and Coastwise		166	142	114	82	58	46		160	136	112	80	56	44		158	134	111	79	55	43		158	134	111	79	55	43		160	136	112	80	56	44		158	134	111	79	55	43		166	142	114	82	58	46
12		Export, Intercoastal and Coastwise		161	137	114	82	58	46		159	135	112	80	56	44		158	134	111	79	55	43		159	135	112	80	56	44		159	135	112	80	56	44		158	134	111	79	55	43		161	137	114	82	58	46
13	Forrest	Ill.	924							845							764							912							851							1018						
14		Domestic		171	145	120	86	60	47		163	139	114	82	57	45		160	136	112	80	56	44		160	136	112	80	56	44		167	142	117	84	58	46		184	156	129	92	64	51
15		Import, Intercoastal and Coastwise		164	141	112	81	58	46		156	133	109	78	55	43		156	133	109	78	55	43		158	135	110	79	56	44		156	133	109	78	55	43		164	141	112	81	58	46
16		Export, Intercoastal and Coastwise		159	136	112	81	58	46		156	133	109	78	55	43		157	134	110	79	56	44		157	134	110	79	56	44		157	134	110	79	56	44		161	137	114	82	58	46
17	Fort Wayne	Ind.	744							668							621							778							655							839						
18		Domestic		152	129	106	76	53	42		143	122	100	72	50	39		135	115	95	68	47	37		138	117	97	69	48	38		155	132	109	78	54	43		154	131	108	77	54	43
19		Import, Intercoastal and Coastwise		143	123	98	71	50	40		137	117	96	69	48	38		135	115	95	68	47	37		137	117	96	69	48	38		135	115	95	68	47	37		143	123	98	71	50	40
20		Export, Intercoastal and Coastwise		138	118	98	71	50	40		136	116	96	69	48	38		135	115	95	68	47	37		136	116	96	69	48	38		135	115	95	68	47	37		138	118	98	71	50	40
21	Fostoria	Ohio	654							578							531							720							565							749						
22		Domestic		138	117	97	69	48	38		130	111	91	65	46	36		130	111	91	65	46	36		125	106	88	63	44	34		125	106	88	63	44	34		142	122	100	72	50	39
23		Import, Intercoastal and Coastwise		133	114	94	66	47	37		127	108	89	64	45	35		125	106	88	63	44	34		125	106	88	63	44	34		125	106	88	63	44	34		133	114	94	66	47	37
24		Export, Intercoastal and Coastwise		128	109	91	66	47	37		126	107	89	64	45	35		125	106	88	63	44	34		125	106	88	63	44	34		125	106	88	63	44	34		125	106	88	63	44	34
25	Freeport	Ill.	996							925							878							1024							883							1067						
26		Domestic		180	153	126	90	63	50		173	147	121	87	61	48		167	142	117	84	58	46		166	141	116	83	58	46		167	142	117	84	58	46		183	156	128	92	64	50
27		Import, Intercoastal and Coastwise		175	150	124	87	61	49		169	144	118	85	59	47		167	142	117	84	58	46		166	141	116	83	58	46		167	142	117	84	58	46		175	150	120	87	61	49
28		Export, Intercoastal and Coastwise		170	145	120	87	61	49		168	143	118	85	59	47		167	142	117	84	58	46		166	141	116	83	58	46		167	142	117	84	58	46		170	145	120	87	61	49
29	Galesburg	Ill.	1030							934							901							1023							941							1125						
30		Domestic		185	157	130	93	65	51		177	150	124	89	62	49		171	145	120	86	60	47		174	148	122	87	61	48		180	153	126	90	63	50		190	162	133	95	67	52
31		Import, Intercoastal and Coastwise		179	153	123	89	63	50		173	147	121	87	61	48		171	145	120	86	60	47		173	147	121	87	61	48		171	145	120	86	60	47		179	153	123	89	63	50
32		Export, Intercoastal and Coastwise		174	148	123	89	63	50		172	146	121	87	61	48		172	146	121	87	61	48		172	146	121	87	61	48		171	145	120	86	60	47		174	148	123	89	63	50
33	Gallipolis	Ohio	616							526							452							518							536							843						
34		Domestic		135	115	95	68	47	37		127	108	89	64	44	35		114	97	80	57	40	31		124	105	87	62	43	34		127	108	89	64	44	35		155	132	109	78	54	43
35		Import, Intercoastal and Coastwise		122	105	83	60	43	34		116	99	81	58	41	32		114	97	80	57	40	31		114	97	80	57	40	31		116	99	81	58	41	32		122	105	83	60	43	34
36		Export, Intercoastal and Coastwise		117	100	83	60	43	34		115	98	81	58	41	32		114	97	80	57	40	31		115	98	81	58	41	32		114	97	80	57	40	31		114	97	80	57	40	31
37	Geneseo	Ill.	1018							942							895							1028							920							1104						
38		Domestic		180	153	126	90	63	50		173	147	121	87	61	48		167	142	117	84	58	46		169	144	118	85	59	46		169	144	118	85	59	46		186	158	130	93	65	51
39		Import, Intercoastal and Coastwise		175	150	120	87	61	49		169	144	118	85	59	47		167	142	117	84	58	46		169	144	118	85	59	46		169	144	118	85	59	46		175	150	120	87	61	49
40		Export, Intercoastal and Coastwise		170	145	120	87	61	49		169	144	118	85	59	47		167	142	117	84	58	46		169	144	118	85	59	46		167	142	117	84	58	46		170	145	120	87	61	49
41	Grand Rapids	Mich.	767							760							713							905							654							828						
42		Domestic		154	131	108	77	54	42		154	131	108	77	54	42		147	125	103	74	51	40		138	117	97	69	48	38		167	142	117	84	58	46		155	132	109	78	54	43
43		Import, Intercoastal and Coastwise		146	123	103	74	51	39		148	126	104	75	52	40		146	123	103	74	51	39		138	117	97	69	48	38		146	123	103	74	51	39		154	131	106	77	54	42
44		Export, Intercoastal and Coastwise		150	128	106	77	54	42		148	126	104	75	52	40		147	125	103	74	51	39		138	117	97	69	48	38		147	125	103	74	51	39		150	128	106	77	54	42
45	Greensburg	Ind.	787							707							623							720							745							929						
46		Domestic		157	133	110	79	55	43		147	125	103	74	51	40		138	117	97	69	48	38		149	127	104	75	52	41		158	134	111	79	55	43		165	140	116	83	58	45
47		Import, Intercoastal and Coastwise		146	125	100	72	51	41		140	119	98	70	49	39		138	117	97	69	48	38		140	119	98	70	49	39		138	117	97	69	48	38		146	125	100	72	51	41
48		Export, Intercoastal and Coastwise		141	120	100	72	51	41		139	118	98	70	49	39		139	118	98	70	49	39		139	118	98	70	49	39		138	117	97	69	48	38		141	120	100	72	51	41
49	Grindstone City	Mich.	684							690							688							903							571							755						
50		Domestic		144	122	101	72	50	40		144	122	101	72	50	40		144	122	101	72	50	40		131	111	92	66	46	36		168	143	118	84	59	46		149	127	104	75	52	41
51		Import, Intercoastal and Coastwise		144	122	101	72	50	40		138	116	96	69	48	38		138	116	96	69	48	38		131	111	92	66	46	36		126	114	98	69	47	37		144	122	101	72	50	40
52		Export, Intercoastal and Coastwise		144	122	101	72	50	40		142	120	99	70	48	38		142	120	99	70	48	38		131	111	92	66	46	36		141	119	98	69	47	37		144	122	101	72	50	40
53	Henderson	Ky.	962							882							798							895							929							1113						
54		Domestic		178	151	125	89	62	49		168	143	118	84	59	46		169	143	118	84	59	46		165	140	116	83	58	45		169	144	118	85	59	46		186	158	130	93	65	51
55		Import, Intercoastal and Coastwise		163	139	114	82	57	45		161	137	113	81	56	44		163	139	114	82	57	45		161	137	113	81	56	44		163	139	114	82	57	45		169	145	116	84	59	47
56		Export, Intercoastal and Coastwise		164	140	116	84	59	47		162	138	114	82	57	45		162	138	114	82	57	45		161	137	113	81	56	44		162	138	114	82	57	45		164	140	116	84	59	47
57	Huntingburg	Ind.	904							824							740							838							878							1062						
58		Domestic		171	145	120	86	60	47		152	129	106	76	53	42		163	139	114	82	57	45		161	137	113	81	56	44		152	129	106	76	53	42		179	152	125	90	63	49
59		Import, Intercoastal and Coastwise		160	137	109	79	56	45		152	129	106	76	53	42		154	131	107	77	54	43		152	129	106	76	53	42		154	131	107	77	54	43		160	137	109	79	56	45
60		Export, Intercoastal and Coastwise		153	130	107	77	54	43		152	129	106	76	53	42		153	130	107	77	54	43		152	129	106	76	53	42		153	130	107	77	54	43		160	137	109	79	56	45
61	Indianapolis	Ind.	799							723							650							767							750							934						
62		Domestic		156	133	109	78	55	43		149	127	104	75	52	41		140	120	99	71	49	39		152	129	106	76	53	42		149	127	104	75	52	41		165	140	116	83	58	45
63		Import, Intercoastal and Coastwise		149	128	102	74	52	42		143	122	100	72	50	40		143	122	100	72	50	40		141	120	99	71	49	39		143	122	100	72	50	40		149	128	102	74	52	42
64		Export, Intercoastal and Coastwise		144	123	102	74	52	42		142	121	100	72	50	40		142	121	100	72	50	40		142	121	100	72	50	40		142	121	100	72	50	40		144	123	102	74	52	42
65	Jackson	Mich.	767							666							619							811							598							782						
66		Domestic		146	124	102	73	51	40		141	120	99	71	49	39		133	113	93	67	47	37		158	134	111	79	55	43		151	128	106	76	53	42		151	128	106	76	53	42
67		Import, Intercoastal and Coastwise		143	123	98	71	50	40		135	115	95	68	47	37		133	113	93	67	47	37		135	115	95	68	47	37		133	113	93	67	47	37		133	113	93	67	47	37
68		Export, Intercoastal and Coastwise		138	118	98	71	50	40		136	116	96	69	48	38		135	115	95	68	47	37		135	115	95	68	47	37		135	115	95	68	47	37		138	118	98	71	50	40

Item	BETWEEN AND	Miles	NEW YORK, N. Y. CLASSES 1	2	3	4	5	6	Miles	PHILADELPHIA, PA. CLASSES 1	2	3	4	5	6	Miles	BALTIMORE, MD. CLASSES 1	2	3	4	5	6	Miles	ALBANY, N. Y. CLASSES 1	2	3	4	5	6	Miles	NORFOLK, VA. CLASSES 1	2	3	4	5	6	Miles	BOSTON, MASS. CLASSES 1	2	3	4	5	6
1	Kalamazoo	774							730							661							683						870											
2	Domestic		154	131	108	77	54	42		147	125	103	74	51	40		138	117	97	69	48	38		147	125	103	74	51	40		138	117	97	69	48	38		163	139	114	82	57	45		155	132	109	78	54	43
3	Import, Intercoastal and Coastwise		151	130	103	75	53	42		145	124	101	73	51	40		138	117	97	69	48	38		143	122	100	72	50	39		138	117	97	69	48	38		143	122	100	72	50	39		151	130	103	75	53	42
4	Export, Intercoastal and Coastwise		146	125	103	75	53	42		143	122	100	72	50	39		138	117	97	69	48	38		143	122	100	72	50	39		138	117	97	69	48	38		143	122	100	72	50	39		146	125	103	75	53	42
5	La Fayette	811							765							699							764						828							948						
6	Domestic		162	138	113	81	57	45		155	132	109	78	54	43		146	124	102	73	51	40		151	128	106	76	53	42		160	136	112	80	56	44		167	142	117	84	58	46
7	Import, Intercoastal and Coastwise		154	132	105	76	54	43		148	126	103	74	52	41		146	124	102	73	51	40		154	132	105	76	54	43		148	126	103	74	52	41		154	132	105	76	54	43
8	Export, Intercoastal and Coastwise		149	127	105	76	54	43		147	125	103	74	52	41		146	124	102	73	51	40		147	125	103	74	52	41		146	124	102	73	51	40		149	127	105	76	54	43
9	Lansing	707							701							654							594						846							878						
10	Domestic		146	124	102	73	51	40		144	122	101	72	50	40		139	118	97	70	49	38		133	113	92	67	47	37		139	118	97	70	49	38		163	139	114	82	57	45		151	128	106	76	53	42
11	Import, Intercoastal and Coastwise		146	124	100	73	51	40		140	118	98	71	49	38		139	118	97	70	48	37		133	113	93	67	47	37		139	118	97	70	48	37		163	139	114	82	57	45		151	128	106	76	53	42
12	Export, Intercoastal and Coastwise		142	121	100	73	51	40		140	119	98	71	49	38		139	118	97	70	48	37		133	113	93	67	47	37		139	118	97	70	48	37		163	139	114	82	57	45		151	128	106	76	53	42
13	Lexington	790							710							618							710						643							1017						
14	Domestic		163	139	114	82	57	45		154	131	108	77	54	42		142	121	99	71	50	39		163	139	114	82	57	45		147	125	103	74	51	40		163	139	114	82	57	45		157	135	112	81	56	44
15	Import, Intercoastal and Coastwise		150	129	102	74	52	42		144	123	100	72	51	40		142	121	99	71	50	39		144	123	102	74	52	42		142	121	99	71	50	39		150	129	102	74	53	42		150	129	102	74	53	42
16	Export, Intercoastal and Coastwise		145	124	102	74	52	41		143	122	100	72	51	40		142	121	99	71	50	39		143	122	100	72	51	40		142	121	99	71	50	39		143	122	100	72	51	40		143	124	102	74	53	42
17	Lima	694							618							566							618						719							795						
18	Domestic		145	123	102	73	51	40		136	116	95	68	48	37		125	106	88	63	44	34		132	113	93	67	47	37		147	125	103	74	51	40		150	128	105	75	53	41
19	Import, Intercoastal and Coastwise		138	118	97	69	48	38		127	108	89	64	45	35		125	106	88	63	44	34		126	107	89	64	45	35		125	106	88	63	44	34		133	113	94	67	47	37
20	Export, Intercoastal and Coastwise		138	118	97	69	48	38		126	107	89	64	45	35		125	106	88	63	44	34		126	107	89	64	45	35		125	106	88	63	44	34		128	108	91	66	47	37
21	Litchfield	1066							930							857							945						974							1129						
22	Domestic		180	153	126	90	63	50		173	147	121	87	61	48		165	140	116	83	58	45		167	142	117	84	59	46		165	140	116	83	58	45		174	148	122	87	61	48		187	158	131	94	65	51
23	Import, Intercoastal and Coastwise		173	148	119	86	61	48		167	142	117	84	59	46		165	140	116	83	58	45		167	142	117	84	59	46		165	140	116	83	58	45		165	140	116	83	58	45		168	143	119	86	61	48
24	Export, Intercoastal and Coastwise		168	143	119	86	61	48		166	141	117	84	59	46		165	140	116	83	58	45		166	141	117	84	59	46		165	140	116	83	58	45		168	143	119	86	61	48		168	143	119	86	61	48
25	Logan	594							514							430							514						583							821						
26	Domestic		132	112	92	66	46	36		123	105	86	62	43	34		111	94	78	56	39	31		135	115	95	68	47	37		130	111	91	65	46	36		135	115	95	68	47	37
27	Import, Intercoastal and Coastwise		119	102	81	59	42	34		113	96	79	57	40	32		111	94	78	56	39	31		113	96	79	57	40	32		111	94	78	56	39	31		119	102	87	59	42	34
28	Export, Intercoastal and Coastwise		114	97	81	59	42	34		112	95	79	57	40	32		111	94	78	56	39	31		112	95	79	57	40	32		112	95	79	57	40	32		114	97	81	58	41	33
29	Logansport	816							740							677							727						806							951						
30	Domestic		156	133	109	78	55	43		149	127	104	75	52	41		142	121	99	71	50	39		145	123	102	73	51	40		155	132	109	78	54	43		162	138	113	81	57	45
31	Import, Intercoastal and Coastwise		150	129	102	74	53	42		144	123	100	72	51	40		142	121	99	71	50	39		144	123	100	72	51	40		142	121	99	71	50	39		150	129	102	74	53	42
32	Export, Intercoastal and Coastwise		145	124	102	74	53	42		143	122	100	72	51	40		142	121	99	71	50	39		143	122	100	72	51	40		142	121	99	71	50	39		145	124	102	74	53	42
33	Louisville	852							772							688							826						785							1010						
34	Domestic		164	139	115	82	57	45		154	131	108	77	54	42		145	123	102	73	51	40		157	133	110	79	55	43		156	133	109	78	55	43		174	148	122	87	61	48
35	Import, Intercoastal and Coastwise		153	131	105	76	54	43		147	125	103	74	52	41		145	123	102	73	51	40		147	125	103	74	52	41		145	123	102	73	51	40		165	140	116	83	58	45
36	Export, Intercoastal and Coastwise		148	126	105	76	54	43		148	126	105	76	54	43		145	123	102	73	51	40		148	126	105	76	54	43		145	123	102	73	51	40		165	140	116	83	58	45
37	Ludington	820							826							809							707						1001							1017						
38	Domestic		165	140	116	83	58	45		165	140	116	83	58	45		162	138	113	81	57	45		151	128	106	76	53	42		182	155	127	91	64	50		151	128	106	76	53	42
39	Import, Intercoastal and Coastwise		158	134	114	81	56	43		158	134	114	81	56	43		157	132	113	80	55	42		151	128	106	76	53	42		157	132	113	80	55	42		165	140	116	83	58	45
40	Export, Intercoastal and Coastwise		165	140	116	83	58	45		163	138	114	81	56	43		162	137	113	80	55	42		151	128	106	76	53	42		162	137	113	80	55	42		165	140	116	83	58	45
41	Manistique	945							951							940							833						1132							1017						
42	Domestic		182	155	127	91	64	50		182	155	127	91	64	50		182	155	127	91	64	50		167	142	117	84	58	47		200	170	140	100	70	55		185	157	130	93	65	51
43	Import, Intercoastal and Coastwise		176	149	125	89	62	48		176	149	125	89	62	48		174	147	124	88	61	47		167	142	117	84	58	47		174	147	124	88	61	47		182	155	127	91	64	50
44	Export, Intercoastal and Coastwise		182	155	127	91	64	50		180	153	125	89	62	48		179	152	124	88	61	47		167	142	117	84	58	47		179	152	124	88	61	47		182	155	127	91	64	50
45	Mansfield	608							532							485							547						677							731						
46	Domestic		133	113	93	67	47	37		123	105	86	62	43	34		118	100	83	59	41	32		124	105	87	62	43	34		124	105	87	62	43	34		141	120	99	71	49	39
47	Import, Intercoastal and Coastwise		126	108	86	62	44	35		120	102	84	60	42	33		118	100	83	59	41	32		120	102	84	60	42	33		125	106	88	63	44	34		126	107	88	63	44	34
48	Export, Intercoastal and Coastwise		121	103	86	62	44	35		119	101	84	60	42	33		118	100	83	59	41	32		119	101	84	60	42	33		119	101	84	60	42	33		121	103	86	62	44	35
49	Marinette	927							815							922							1114						1114							989						
50	Domestic		167	142	117	84	58	46		166	141	116	83	58	46		166	141	116	83	58	46		153	130	107	77	54	42		185	157	130	93	65	51		169	144	118	85	59	46
51	Import, Intercoastal and Coastwise		161	136	115	82	56	44		161	136	115	82	56	44		159	134	114	81	55	43		153	130	107	77	54	42		159	134	114	81	55	43		167	142	117	84	58	46
52	Export, Intercoastal and Coastwise		167	142	117	84	58	46		165	140	116	83	58	46		164	139	114	81	55	43		153	130	107	77	54	42		164	139	114	81	55	43		167	142	117	84	58	46
53	Marion	1036							956							872							956						969							1175						
54	Domestic		185	157	130	93	65	51		177	150	124	89	62	49		166	141	116	83	58	46		177	150	124	89	62	49		174	148	122	87	61	48		194	165	136	97	68	53
55	Import, Intercoastal and Coastwise		174	149	119	86	61	48		168	143	117	84	59	47		166	141	116	83	58	46		167	142	117	84	59	47		166	141	116	83	58	46		174	148	119	86	61	48
56	Export, Intercoastal and Coastwise		169	144	119	86	61	48		167	142	117	84	59	47		166	141	116	83	58	46		167	142	117	84	59	47		166	141	116	83	58	46		169	144	119	86	61	48
57	Marion	645							569							522							569						677							758						
58	Domestic		130	111	91	65	46	36		120	102	84	60	42	33		121	103	85	61	42	33		120	102	84	60	42	33		121	103	85	61	42	33		125	106	88	63	44	34
59	Import, Intercoastal and Coastwise		123	105	86	62	43	34		123	105	86	62	43	34		121	103	85	61	42	33		123	105	86	62	43	34		121	103	85	61	42	33		123	105	86	62	43	34
60	Export, Intercoastal and Coastwise		124	106	88	64	45	36		122	104	86	62	43	34		121	103	85	61	42	33		122	104	86	62	43	34		121	103	85	61	42	33		124	106	88	64	45	36
61	Mattoon	928							852							778							876						895							1060						
62	Domestic		172	146	120	86	60	47		164	139	115	82	57	45		156	133	109	78	55	43		163	139	114	82	57	45		166	141	116	83	58	46		179	152	125	89	62	49
63	Import, Intercoastal and Coastwise		164	141	112	81	58	46		158	135	110	79	56	44		156	133	109	78	55	43		156	135	110	79	56	44		156	133	109	78	55	43		164	141	112	81	58	46
64	Export, Intercoastal and Coastwise		157	134	110	79	56	44		157	134	110	79	56	44		156	133	109	78	55	43		157	134	110	79	56	44		156	133	109	78	55	43		159	136	112	81	58	46
65	Midland City	681							601							537							677						637							861						
66	Domestic		134	114	94	67	47	37		134	114	94	67	47	37		124	105	87	62	43	34		134	114	94	67	47	37		135	115	95	68	47	37		158	134	111	79	55	43
67	Import, Intercoastal and Coastwise		132	113	93	66	46	37		126	107	88	63	44	35		124	105	87	62	43	34		126	107	88	63	44	35		124	105	87	62	43	34		127	108	90	65	46	37
68	Export, Intercoastal and Coastwise		127	108	90	65	46	37		125	106	88	63	44	35		124	105	87	62	43	34		125	106	88	63	44	35		124	105	87	62	43	34		125	106	88	64	45	36

Item	BETWEEN / AND	NEW YORK, N. Y. Miles	CLASSES 1	2	3	4	5	6	PHILADELPHIA, PA. Miles	CLASSES 1	2	3	4	5	6	BALTIMORE, MD. Miles	CLASSES 1	2	3	4	5	6	ALBANY, N. Y. Miles	CLASSES 1	2	3	4
1	Milwaukee ..... Wis.	881							578							831							769				
2	Domestic		167	142	117	84	58	46		166	141	116	83	58	46		161	137	113	81	56	44		153	130	107	77
3	Import, Intercoastal and Coastwise		167	142	116	84	58	46		161	136	114	82	56	44		159	134	113	81	55	43		153	130	107	77
4	Export, Intercoastal and Coastwise		164	140	116	84	58	46		162	138	114	82	56	44		161	137	113	81	55	43		153	130	107	77
5	Mount Carmel ..... Ill.	936							856							772							891				
6	Domestic		154	132	109	78	55	43		165	140	116	83	58	45		156	133	109	78	55	43		164	139	115	82
7	Import, Intercoastal and Coastwise		154	132	109	78	55	43		158	135	110	79	56	44		156	133	109	78	55	43		158	135	110	79
8	Export, Intercoastal and Coastwise		152	130	107	78	55	43		157	134	110	79	56	44		156	133	109	78	55	43		157	134	110	79
9	Muncie ..... Ind.	756							680							614							695				
10	Domestic		152	129	106	76	53	42		143	122	100	72	50	39		135	115	95	68	47	37		143	122	100	72
11	Import, Intercoastal and Coastwise		143	122	98	71	50	40		137	117	96	69	48	38		135	115	95	68	47	37		137	117	96	69
12	Export, Intercoastal and Coastwise		128	113	98	71	50	40		136	116	96	69	48	38		135	115	95	68	47	37		136	116	96	69
13	Muskegon ..... Mich.	802							800							753							690				
14	Domestic		158	134	111	79	55	43		154	131	108	77	54	42		149	127	104	75	52	41		144	122	101	72
15	Import, Intercoastal and Coastwise		157	134	107	78	55	43		151	128	105	76	53	41		149	126	104	75	52	40		144	122	101	72
16	Export, Intercoastal and Coastwise		152	130	107	78	55	43		149	128	105	76	53	41		149	127	104	75	52	40		144	122	101	72
17	Newark ..... Ohio	588							512							463							597				
18	Domestic		132	112	92	66	46	36		123	105	86	62	43	34		113	96	79	57	40	31		130	111	91	65
19	Import, Intercoastal and Coastwise		121	104	82	60	43	34		115	98	80	58	41	32		113	96	79	57	40	31		115	98	80	58
20	Export, Intercoastal and Coastwise		116	99	82	60	43	34		114	97	80	58	41	32		113	96	79	57	40	31		114	97	80	58
21	North Vernon ..... Ind.	796							716							632							770				
22	Domestic		157	133	110	79	55	43		147	125	103	74	51	40		138	117	97	69	48	38		152	129	106	76
23	Import, Intercoastal and Coastwise		146	125	100	72	51	41		140	119	98	70	49	39		138	117	97	69	48	38		140	119	98	70
24	Export, Intercoastal and Coastwise		141	120	100	72	51	41		139	118	98	70	49	39		138	117	97	69	48	38		139	118	98	70
25	Pana ..... Ill.	966							890							817							909				
26	Domestic		176	150	123	88	62	48		168	143	118	84	59	46		161	137	113	81	56	44		166	141	116	83
27	Import, Intercoastal and Coastwise		169	145	116	84	58	47		163	139	114	82	57	45		163	139	114	82	57	45		163	139	114	82
28	Export, Intercoastal and Coastwise		6164	140	116	84	59	47		162	138	114	82	57	45		161	137	113	81	56	44		162	138	114	82
29	Parkersburg ..... W. Va.	530							450							366							624				
30	Domestic		125	106	88	63	44	34		114	97	80	57	40	31		101	86	71	51	35	28		135	115	95	68
31	Import, Intercoastal and Coastwise		109	94	74	54	38	31		103	88	72	52	36	29		101	86	71	51	35	28		103	88	72	52
32	Export, Intercoastal and Coastwise		109	94	74	54	38	31		103	88	72	52	36	29		101	86	71	51	35	28		103	88	72	52
33	Peoria ..... Ill.	988							912							849							899				
34	Domestic		178	151	125	89	62	49		171	145	120	86	60	47		163	139	114	82	57	45		165	140	116	83
35	Import, Intercoastal and Coastwise		171	147	117	85	60	48		165	141	115	83	58	46		163	139	114	82	57	45		165	141	115	83
36	Export, Intercoastal and Coastwise		166	142	117	85	60	48		164	140	115	83	58	46		163	139	114	82	57	45		164	140	115	83
37	Painesville ..... Ohio	538							475							442							440				
38	Domestic		125	106	88	63	44	34		118	100	83	59	41	32		112	95	78	56	39	31		112	95	78	56
39	Import, Intercoastal and Coastwise		120	103	81	59	42	34		114	97	79	57	40	32		112	95	78	56	39	31		112	95	78	56
40	Export, Intercoastal and Coastwise		115	98	81	59	42	34		113	96	79	57	40	32		112	95	78	56	39	31		112	95	78	56
41	Petoskey ..... Mich.	837							843							841							724				
42	Domestic		169	144	118	85	59	46		169	144	118	85	59	46		169	144	118	85	59	46		155	132	109	78
43	Import, Intercoastal and Coastwise		163	139	114	82	57	45		163	139	114	82	57	44		163	139	114	82	57	44		155	132	109	78
44	Export, Intercoastal and Coastwise		159	144	118	85	59	46		167	142	116	83	57	44		166	141	116	82	56	43		155	132	109	78
45	Piqua ..... Ohio	691							618							552							641				
46	Domestic		145	123	102	73	51	40		136	116	95	68	48	37		125	106	88	63	44	34		138	117	97	69
47	Import, Intercoastal and Coastwise		133	114	91	66	47	37		127	108	89	64	45	35		125	106	88	63	44	34		127	108	89	64
48	Export, Intercoastal and Coastwise		133	109	91	66	47	37		126	107	89	64	45	35		125	106	88	63	44	34		126	107	89	64
49	Plymouth ..... Ind.	868							732							685							719				
50	Domestic		156	133	109	78	55	43		149	127	104	75	52	41		142	121	99	71	50	39		145	123	102	73
51	Import, Intercoastal and Coastwise		150	129	102	74	53	42		144	123	100	72	51	40		142	121	99	71	50	39		144	123	100	72
52	Export, Intercoastal and Coastwise		145	124	102	74	53	42		143	122	100	72	51	40		142	121	99	71	50	39		143	122	100	72
53	Pontiac ..... Mich.	649							655							630							537				
54	Domestic		142	122	99	71	50	39		140	119	98	70	49	39		134	114	94	67	47	37		128	109	90	64
55	Import, Intercoastal and Coastwise		142	121	97	70	50	39		136	115	95	68	48	37		134	113	94	67	47	36		128	109	90	64
56	Export, Intercoastal and Coastwise		137	117	97	70	50	39		135	115	95	68	48	37		134	114	94	67	47	36		128	109	90	64
57	Port Huron ..... Mich.	592							598							596							479				
58	Domestic		135	115	95	68	47	37		135	115	95	68	47	37		132	112	92	66	46	36		125	106	88	63
59	Import, Intercoastal and Coastwise		135	115	95	68	47	37		129	109	93	66	45	35		127	107	92	65	44	34		125	106	88	63
60	Export, Intercoastal and Coastwise		135	115	95	68	47	37		133	113	93	66	45	35		132	112	92	65	44	34		125	106	88	63
61	Portsmouth ..... Ohio	654							574							490							703				
62	Domestic		139	118	97	70	49	38		130	111	91	65	46	36		118	100	83	59	41	32		144	122	101	72
63	Import, Intercoastal and Coastwise		126	108	86	62	44	35		120	102	84	60	42	33		118	100	83	59	41	32		120	102	84	60
64	Export, Intercoastal and Coastwise		121	103	86	62	44	35		119	101	84	60	42	33		118	100	83	59	41	32		119	101	84	60
65	Quincy ..... Ill.	1101							1025							952							1030				
66	Domestic		188	160	132	94	66	52		180	153	126	90	63	50		174	148	122	87	61	48		182	153	126	90
67	Import, Intercoastal and Coastwise		182	156	128	90	64	51		176	150	123	88	62	49		174	148	122	87	61	48		176	150	123	88
68	Export, Intercoastal and Coastwise		177	151	125	90	64	51		175	149	123	88	62	49		174	148	122	87	61	48		175	149	123	88

Item	BETWEEN / AND	Y. Miles	CLASSES 5	6	PHILADELPHIA, PA. Miles	CLASSES 1	2	3	4	5	6	BALTIMORE, MD. Miles	CLASSES 1	2	3	4	5	6	ALBANY, N. Y. Miles	CLASSES 1	2	3	4	5	6	NORFOLK, VA. Miles	CLASSES 1	2	3	4	5	6	BOSTON, MASS. Miles	CLASSES 1	2	3	4	5	6
1	Milwaukee ..... Wis.				878							831							769							999							968					
2	Domestic		58	46		166	141	116	83	58	46		161	137	113	81	56	44		153	130	107	77	54	42		176	150	123	88	62	48		169	144	118	85	59	46
3	Import, Intercoastal and Coastwise		58	46		161	136	114	82	56	44		159	134	113	81	55	43		153	130	107	77	54	42		159	134	113	81	55	43		167	142	116	84	58	46
4	Export, Intercoastal and Coastwise		58	46		162	138	114	82	56	44		161	137	113	81	55	43		153	130	107	77	54	42		161	137	113	81	55	43		164	140	116	84	58	46
5	Mount Carmel ..... Ill.				856							772							891							870							1075					
6	Domestic		61	48		165	140	116	83	58	45		156	133	109	78	55	43		164	139	115	82	57	45		164	139	114	82	57	45		180	153	126	90	63	50
7	Import, Intercoastal and Coastwise		58	46		158	135	110	79	56	44		156	133	109	78	55	43		158	135	110	79	56	44		156	133	109	78	55	43		164	141	112	81	58	46
8	Export, Intercoastal and Coastwise		58	46		157	134	110	79	56	44		156	133	109	78	55	43		157	134	110	79	56	44		156	133	109	78	55	43		159	136	112	81	58	46
9	Muncie ..... Ind.				680							614							695							743							879					
10	Domestic		53	42		143	122	100	72	50	39		135	115	95	68	47	37		143	122	100	72	50	39		150	128	105	75	53	41		160	136	112	80	56	44
11	Import, Intercoastal and Coastwise		50	40		137	117	96	69	48	38		135	115	95	68	47	37		137	117	96	69	48	38		135	115	95	68	47	37		143	123	98	71	50	40
12	Export, Intercoastal and Coastwise		50	40		136	116	96	69	48	38		135	115	95	68	47	37		136	116	96	69	48	38		135	115	95	68	47	37		138	118	98	71	50	40
13	Muskegon ..... Mich.				800							753							690							945							874					
14	Domestic		55	43		154	131	108	77	54	42		149	127	104	75	52	41		144	122	101	72	50	40		169	144	118	85	59	46		162	138	113	81	57	45
15	Import, Intercoastal and Coastwise		55	43		151	128	105	76	53	41		149	126	104	75	52	40		144	122	101	72	50	40		149	126	104	75	52	40		157	134	107	78	55	43
16	Export, Intercoastal and Coastwise		55	43		150	128	105	76	53	41		149	127	104	75	52	40		144	122	101	72	50	40		149	127	104	75	52	42		152	130	107	78	55	43
17	Newark ..... Ohio				512							463							597							630							781					
18	Domestic		46	36		123	105	86	62	43	34		113	96	79	57	40	31		130	111	91	65	46	36		135	115	95	68	47	37		151	128	106	76	53	42
19	Import, Intercoastal and Coastwise		43	34		115	98	80	58	41	32		113	96	79	57	40	31		115	98	80	58	41	32		117	99	82	59	41	32		121	104	82	60	43	34
20	Export, Intercoastal and Coastwise		43	34		114	97	80	58	41	32		113	96	79	57	40	31		114	97	80	58	41	32		117	99	82	59	41	32		116	99	82	60	43	34
21	North Vernon ..... Ind.				716							632							770							729							954					
22	Domestic		55	43		147	125	103	74	51	40		138	117	97	69	48	38		152	129	106	76	53	42		150	128	105	75	53	41		155	132	109	78	54	43
23	Import, Intercoastal and Coastwise		51	41		140	119	98	70	49	39		138	117	97	69	48	38		140	119	98	70	49	39		138	117	97	69	48	38		146	125	103	73	51	41
24	Export, Intercoastal and Coastwise		51	41		139	118	98	70	49	39		138	117	97	69	48	38		139	118	98	70	49	39		138	117	97	69	48	38		141	120	100	72	51	41
25	Pana ..... Ill.				890							817							909							934							1093					
26	Domestic		62	48		168	143	118	84	59	46		161	137	113	81	56	44		166	141	116	83	58	46		169	144	118	85	59	46		184	156	129	92	64	51
27	Import, Intercoastal and Coastwise		59	47		163	139	114	82	57	45		163	139	114	82	57	45		163	139	114	82	57	45		163	139	114	82	57	45		169	145	116	84	59	47
28	Export, Intercoastal and Coastwise		59	47		162	138	114	82	57	45		161	137	113	81	56	44		162	138	114	82	57	45		162	138	114	82	57	45		164	140	116	84	59	47
29	Parkersburg ..... W. Va.				450							366							624							558							757					
30	Domestic		44	34		114	97	80	57	40	31		101	86	71	51	35	28		135	115	95	68	47	37		128	109	90	64	45	35		150	128	105	75	53	41
31	Import, Intercoastal and Coastwise		38	31		103	88	72	52	36	29		101	86	71	51	35	28		103	88	72	52	36	29		125	107	85	62	44	35		109	94	74	54	38	31
32	Export, Intercoastal and Coastwise		38	31		103	88	72	52	36	29		101	86	71	51	35	28		103	88	72	52	36	29		125	107	85	62	44	35		109	94	74	54	38	31
33	Peoria ..... Ill.				912							849							899							971							1083					
34	Domestic		62	49		171	145	120	86	60	47		163	139	114	82	57	45		165	140	116	83	58	45		174	148	122	87	61	48		182	155	127	91	64	50
35	Import, Intercoastal and Coastwise		60	48		165	141	115	83	58	46		163	139	114	82	57	45		165	141	115	83	58	45		163	139	114	82	57	45		171	147	117	85	60	48
36	Export, Intercoastal and Coastwise		60	48		164	140	115	83	58	46		163	139	114	82	57	45		164	140	115	83	58	45		163	139	114	82	57	45		166	142	117	85	60	48
37	Painesville ..... Ohio				475							442							440							634							624					
38	Domestic		44	34		118	100	83	59	41	32		112	95	78	56	39	31		112	95	78	56	39	31		135	115	95	68	47	37		133	113	93	67	47	37
39	Import, Intercoastal and Coastwise		42	34		114	97	79	57	40	32		112	95	78	56	39	31		112	95	78	56	39	31		135	115	95	68	47	37		120	103	81	59	42	34
40	Export, Intercoastal and Coastwise		42	34		113	96	79	57	40	32		112	95	78	56	39	31		112	95	78	56	39	31		135	115	95	68	47	37		115	98	81	59	42	34
41	Petoskey ..... Mich.				843							841							724							1029							908					
42	Domestic		59	46		169	144	118	85	59	46		169	144	118	85	59	46		155	132	109	78	54	43		190	162	133	95	67	52		172	146	120	86	60	47
43	Import, Intercoastal and Coastwise		59	46		163	138	116	83	57	44		161	136	115	82	56	43		155	132	109	78	54	43		161	136	115	82	56	43		169	144	118	85	59	46
44	Export, Intercoastal and Coastwise		59	46		167	142	116	83	57	44		166	141	116	82	56	43		155	132	109	78	54	43		166	141	116	82	56	43		169	144	118	85	59	46
45	Piqua ..... Ohio				618							552							641							690							825					
46	Domestic		51	40		136	116	95	68	48	37		125	106	88	63	44	34		138	117	97	69	48	38		143	122	100	72	50	39		154	131	108	77	54	42
47	Import, Intercoastal and Coastwise		47	37		127	108	89	64	45	35		125	106	88	63	44	34		127	108	89	64	45	35		125	106	88	63	44	34		133	114	91	66	47	37
48	Export, Intercoastal and Coastwise		47	37		126	107	89	64	45	35		125	106	88	63	44	34		126	107	89	64	45	35		125	106	88	63	44	34		128	109	91	66	47	37
49	Plymouth ..... Ind.				732							685							719							838							903					
50	Domestic		55	43		149	127	104	75	52	41		142	121	99	71	50	39		145	123	102	73	51	40		160	136	112	80	56	44		162	138	113	81	57	45
51	Import, Intercoastal and Coastwise		53	42		144	123	100	72	51	40		142	121	99	71	50	39		144	123	100	72	51	40		142	121	99	71	50	39		150	129	102	74	53	42
52	Export, Intercoastal and Coastwise		53	42		143	122	100	72	51	40		142	121	99	71	50	39		143	122	100	72	51	40		142	121	99	71	50	39		145	124	102	74	53	42
53	Pontiac ..... Mich.				655							630							537							822							721					
54	Domestic		50	39		140	119	98	70	49	39		134	114	94	67	47	37		128	109	90	64	45	35		160	136	112	80	56	44		145	123	102	73	51	40
55	Import, Intercoastal and Coastwise		50	39		136	115	95	68	48	37		134	113	94	67	47	36		128	109	90	64	45	35		134	113	94	67	47	36		142	121	97	70	50	39
56	Export, Intercoastal and Coastwise		50	39		135	115	95	68	48	37		134	114	94	67	47	36		128	109	90	64	45	35		134	114	94	67	47	36		137	117	97	70	50	39
57	Port Huron ..... Mich.				598							596							479							811							663					
58	Domestic		47	37		135	115	95	68	47	37		132	112	92	66	46	36		125	106	88	63	44	34		158	134	111	79	55	43		143	122	100	72	50	39
59	Import, Intercoastal and Coastwise		47	37		129	109	93	66	45	35		127	107	92	65	44	34		125	106	88	63	44	34		127	107	92	65	44	34		135	115	95	68	47	37
60	Export, Intercoastal and Coastwise		47	37		133	113	93	66	45	35		132	112	92	65	44	34		125	106	88	63	44	34		132	112	92	65	44	34		135	115	95	68	47	37
61	Portsmouth ..... Ohio				574							490							703							550							881					
62	Domestic		49	38		130	111	91	65	46	36		118	100	83	59	41	32		144	122	101	72	50	40		129	110	90	65	45	35		161	137	113	81	56	44
63	Import, Intercoastal and Coastwise		44	35		120	102	84	60	42	33		118	100	83	59	41	32		120	102	84	60	42	33		118	100	83	59	41	32		126	108	86	62	44	35
64	Export, Intercoastal and Coastwise		44	35		119	101	84	60	42	33		118	100	83	59	41	32		119	101	84	60	42	33		119	101	84	60	42	33		121	103	86	62	44	35
65	Quincy ..... Ill.				1025							952							1030							1069							1214					
66	Domestic		66	52		180	153	126	90	63	50		174	148	122	87	61	48		182	153	126	90	63	50		182	155	127	91	64	50		197	167	138	99	69	54
67	Import, Intercoastal and Coastwise		64	51		176	150	123	88	62	49		174	148	122	87	61	48		176	150	123	88	62

Item	BETWEEN / AND	Miles	NEW YORK, N. Y. CLASSES 1	2	3	4	5	6	Miles	PHILADELPHIA, PA. CLASSES 1	2	3	4	5	6	Miles	BALTIMORE, MD. CLASSES 1	2	3	4	5	6	Miles	ALBANY, N. Y. CLASSES 1	2	3	4	5	6	Miles	NORFOLK, VA. CLASSES 1	2	3	4	5	6	Miles	BOSTON, MASS. CLASSES 1	2	3	4	5	6
1	Richmond ..... Ind.	731							655							582							687							707						871					
2	Domestic		150	128	105	75	53	41		142	121	99	71	50	39		131	111	92	66	46	36		142	121	99	71	50	39		144	122	101	72	50	40		160	136	112	80	56	44
3	Import, Intercoastal and Coastwise		139	119	95	69	49	39		133	113	93	67	47	37		131	111	92	66	46	36		133	113	93	67	47	37		131	111	92	66	46	36		139	119	95	69	49	39
4	Export, Intercoastal and Coastwise		134	114	95	69	49	39		132	112	93	67	47	37		131	111	92	66	46	36		132	112	93	67	47	37		131	111	92	66	46	36		134	114	95	69	49	39
5	Rockford ..... Ill.	974							898							851							865							989						1050					
6	Domestic		176	150	123	88	62	48		168	143	118	84	59	46		163	139	114	82	57	45		162	138	113	81	57	45		177	150	124	89	62	49		178	151	125	89	62	49
7	Import, Intercoastal and Coastwise		171	147	117	85	60	48		165	141	115	83	58	45		163	139	114	82	57	45		162	138	113	81	57	45		163	139	114	82	57	45		163	139	114	82	57	45
8	Export, Intercoastal and Coastwise		166	142	117	85	60	48		164	140	115	83	58	45		163	139	114	82	57	45		162	138	113	81	57	45		163	139	114	82	57	45		166	142	117	85	60	48
9	Roodhouse ..... Ill.	1038							962							888							969							1005						1152					
10	Domestic		184	156	129	92	64	51		176	150	123	88	62	48		168	143	118	84	59	46		175	149	123	88	61	48		178	151	125	89	62	49		191	162	134	96	67	53
11	Import, Intercoastal and Coastwise		176	151	121	87	62	49		170	145	119	85	60	47		168	143	118	84	59	46		170	145	119	85	60	47		168	143	118	84	59	46		176	151	121	87	62	49
12	Export, Intercoastal and Coastwise		171	146	121	87	62	49		169	144	119	85	60	47		168	143	118	84	59	46		169	144	119	85	60	47		168	143	118	84	59	46		171	146	121	87	62	49
13	Saginaw ..... Mich.	682							688							683							569							875						753					
14	Domestic		144	122	101	72	50	40		144	122	101	72	50	40		144	122	101	72	50	40		144	122	101	72	50	40		165	140	116	83	58	45		149	127	104	75	52	41
15	Import, Intercoastal and Coastwise		144	122	101	72	50	40		138	116	99	70	48	38		136	114	98	69	47	37		131	111	92	66	46	36		136	114	98	69	47	37		144	122	101	72	50	40
16	Export, Intercoastal and Coastwise		144	122	101	72	50	40		142	120	99	70	48	38		141	119	98	69	47	37		131	111	92	66	46	36		141	119	98	69	47	37		144	122	101	72	50	40
17	St. Louis ..... Mo.	1040							964							891							990							996						1174					
18	Domestic		184	156	129	92	64	51		176	150	123	88	62	48		168	143	118	84	59	46		176	150	123	88	65	46		176	150	123	88	62	48		193	164	135	97	68	53
19	Import, Intercoastal and Coastwise		176	151	121	87	62	49		170	145	119	85	60	47		168	143	118	84	59	46		170	145	119	85	60	47		168	143	118	84	59	46		176	151	121	87	62	49
20	Export, Intercoastal and Coastwise		171	146	121	87	62	49		169	144	119	85	60	47		168	143	118	84	59	46		169	144	119	85	60	47		168	143	118	84	59	46		171	146	121	87	62	49
21	Sandusky ..... Ohio	621							550							504							528							696						712					
22	Domestic		133	113	93	67	47	37		125	106	88	63	44	35		118	100	83	59	41	32		124	105	87	62	43	34		143	122	100	72	50	39		141	120	99	71	49	39
23	Import, Intercoastal and Coastwise		126	108	86	62	44	35		124	102	84	60	42	33		118	100	83	59	41	32		120	102	84	60	42	33		127	107	92	65	44	34		126	108	86	62	44	35
24	Export, Intercoastal and Coastwise		121	103	86	62	44	35		119	101	84	60	42	33		118	100	83	59	41	32		119	101	84	60	42	33		132	112	92	65	44	34		121	103	86	62	44	35
25	Sardina ..... Ohio	713							633							549							722							809						906					
26	Domestic		150	128	105	75	53	41		140	119	98	70	49	39		128	109	90	64	45	35		145	122	102	73	51	40		134	114	94	67	47	37		163	139	114	82	57	45
27	Import, Intercoastal and Coastwise		136	117	93	67	48	38		130	111	91	65	46	36		128	109	90	64	45	35		130	111	91	65	46	36		128	109	90	64	45	35		136	117	93	67	48	38
28	Export, Intercoastal and Coastwise		131	112	93	67	48	38		129	110	91	65	46	36		128	109	90	64	45	35		129	110	91	65	46	36		128	109	90	64	45	35		131	112	93	67	48	38
29	Sheboygan ..... Wis.	907							913							883							794							1052						978					
30	Domestic		167	142	117	84	58	46		166	141	116	83	58	46		166	141	116	83	58	46		153	130	107	77	54	72		185	157	130	93	65	51		169	144	118	85	59	46
31	Import, Intercoastal and Coastwise		167	142	117	84	58	46		161	136	115	82	56	44		159	134	114	81	55	43		153	130	107	77	54	72		159	134	114	81	55	43		167	142	117	84	57	46
32	Export, Intercoastal and Coastwise		167	142	117	84	58	46		165	140	115	82	56	44		164	139	114	81	55	43		153	130	107	77	54	72		164	139	114	81	55	43		167	142	117	84	57	46
33	South Bend ..... Ind.	813							737							690							704							861						888					
34	Domestic		156	133	109	78	55	43		149	127	104	75	52	41		142	121	99	71	50	39		144	122	101	72	50	40		164	139	115	82	57	45		162	138	113	81	57	45
35	Import, Intercoastal and Coastwise		150	129	102	74	53	42		144	123	100	72	51	40		142	121	99	71	50	39		144	122	101	72	50	40		142	121	99	71	50	39		150	129	102	74	53	42
36	Export, Intercoastal and Coastwise		145	124	102	74	53	42		143	122	100	72	51	40		142	121	99	71	50	39		143	122	101	72	50	40		142	121	99	71	50	39		145	124	102	74	53	42
37	Springfield ..... Ill.	991							915							841							922							958						1106					
38	Domestic		178	151	125	89	62	49		171	145	120	86	60	47		163	139	114	82	57	45		168	143	118	84	59	46		172	146	120	86	60	47		185	157	130	93	65	51
39	Import, Intercoastal and Coastwise		171	147	117	85	60	48		165	141	115	83	58	46		163	139	114	82	57	45		165	141	115	83	58	46		163	139	114	82	57	45		171	147	117	85	60	48
40	Export, Intercoastal and Coastwise		166	142	117	85	60	48		164	140	115	83	58	46		163	139	114	82	57	45		164	140	115	83	58	46		163	139	114	82	57	45		166	142	117	85	60	48
41	Springfield ..... Ohio	665							589							524							631							656						815					
42	Domestic		141	120	99	71	49	39		132	112	92	66	46	36		122	104	85	61	43	34		135	115	95	68	47	37		140	119	98	70	49	39		154	131	108	77	54	42
43	Import, Intercoastal and Coastwise		130	112	88	64	46	37		124	106	86	62	44	35		122	104	85	61	43	34		124	106	86	62	44	35		122	104	85	61	43	34		130	112	88	64	46	37
44	Export, Intercoastal and Coastwise		125	107	88	64	46	37		124	105	86	62	44	35		122	104	85	61	43	34		123	105	86	62	44	35		122	104	85	61	43	34		122	104	85	61	43	34
45	Sterling ..... Ill.	999							923							876							898							1021						1082					
46	Domestic		180	153	126	90	63	50		173	147	121	87	61	48		167	142	117	84	58	46		167	142	117	84	58	46		178	151	125	89	62	49		184	156	129	92	64	51
47	Import, Intercoastal and Coastwise		175	150	120	87	61	49		169	144	118	85	59	47		167	142	117	84	58	46		167	142	117	84	58	46		167	142	117	84	58	46		175	150	120	87	61	49
48	Export, Intercoastal and Coastwise		170	145	120	87	61	49		168	143	118	85	59	47		167	142	117	84	58	46		167	142	117	84	58	46		167	142	117	84	58	46		170	145	120	87	61	49
49	Streator ..... Ill.	942							866							819							853							950						1037					
50	Domestic		173	147	121	87	61	48		165	140	116	83	58	45		160	136	112	80	56	44		163	139	114	82	57	45		173	147	121	87	61	48		170	152	125	90	63	49
51	Import, Intercoastal and Coastwise		168	144	115	83	59	47		162	138	113	81	57	45		160	136	112	80	56	44		162	138	113	81	57	45		160	136	112	80	56	44		168	144	115	83	59	47
52	Export, Intercoastal and Coastwise		163	139	115	83	59	47		167	137	113	81	57	45		160	136	112	80	56	44		161	137	113	81	57	45		160	136	112	80	56	44		163	139	115	83	59	47
53	Terre Haute ..... Ind.	871							795							722							821							839						1005					
54	Domestic		167	142	117	84	58	46		160	136	112	80	56	44		151	128	106	76	53	42		156	133	109	78	55	43		163	139	114	82	57	45		174	148	122	87	61	48
55	Import, Intercoastal and Coastwise		159	136	109	79	56	45		153	130	107	77	54	43		151	128	106	76	53	42		153	130	107	77	54	43		151	128	106	76	53	42		159	136	109	79	56	45
56	Export, Intercoastal and Coastwise		154	131	109	79	56	45		152	129	107	77	54	43		151	128	106	76	53	42		152	129	107	77	54	43		151	128	106	76	53	42		154	131	109	79	56	45
57	Toledo ..... Ohio	668							595							518							575							740						759					
58	Domestic		135	115	95	68	47	37		135	115	95	68	47	37		132	112	92	66	46	36		125	106	88	63	44	34		153	130	107	77	54	42		143	122	100	72	50	39
59	Import, Intercoastal and Coastwise		135	115	95	68	47	37		129	109	93	66	45	35		127	107	92	65	44	34		125	106	88	63	44	34		127	107	92	65	44	34		135	115	95	68	47	37
60	Export, Intercoastal and Coastwise		135	115	95	68	47	37		133	113	93	66	45	35		132	112	92	65	44	34		125	106	88	63	44	34		132	112	92	65	44	34		135	115	95	68	47	37
61	Traverse City ..... Mich.	828							834							822							715							1014						899					
62	Domestic		168	143	118	84	59	46		168	143	118	84	59	46		168	143	118	84	59	46		154	131	108	77	54	42		187	159	131	94	65	51		172	146	120	86	60	47
63	Import, Intercoastal and Coastwise		168	143	118	84	59	46		162	137	116	82	57	44		160	135	115	81	56	43		154	131	108	77	54	42		160	135	115	81	56	43		168	143	118	84	59	46
64	Export, Intercoastal and Coastwise		168	143	118	84	59	46		166	141	116	82	57	44		165	140	115	81	56	43		154	131	108	77	54	42		165	140	115	81	56	43		168	143	118	84	59	46
65	Uhrichsville ..... Ohio	522							446							399							542							581						726					
66	Domestic		124	105	87	62	43	34		114	97	80	57	40	31		109	93	76	55	38	30		124	105	87	62	43	34		132	112	92	66	46	36		143	122	100	72	50	39
67	Import, Intercoastal and Coastwise		117	101	79	58	41	33		111	95	77	56	39	31		109	93	76	55	38	30		111	95	77	56	39	31		125	106	88	63	44	34		117	101	79	58	41	33
68	Export, Intercoastal and Coastwise		112	96	79	58	41	33		110	94	77	56	39	31		109	93	76	55	38	30		110	94	77	56	39	31		125	106	88	63	44	34		112	96	79	58	41	33

Item	BETWEEN AND	Miles	NEW YORK, N. Y. CLASSES 1	2	3	4	5	6	Miles	PHILADELPHIA, PA. CLASSES 1	2	3	4	5	6	Miles	BALTIMORE, MD. CLASSES 1	2	3	4	5	6	Miles	ALBANY, N. Y. CLASSES 1	2	3	4	5	6	Miles	NORFOLK, VA. CLASSES 1	2	3	4	5	6	Miles	BOSTON, MASS. CLASSES 1	2	3	4	5	6
1	Valparaiso	Ind.	846						770							723							749							870						933						
2	Domestic			162	138	113	81	57	45	155	132	109	78	54	43		149	127	104	75	52	41		151	128	106	76	53	42		164	139	115	82	57	45		167	142	117	84	58	46
3	Import, Intercoastal and Coastwise			157	135	107	78	55	44	151	129	105	76	53	42		149	127	104	75	52	41		151	128	105	76	53	42		149	127	104	75	52	41		157	135	107	78	55	44
4	Export, Intercoastal and Coastwise			152	130	107	78	55	44	150	128	105	76	53	43		149	127	104	75	52	41		152	128	105	76	53	42		149	127	104	75	52	41		152	130	107	78	55	44
5	Vincennes	Ind.	912						832							748							867							846						1051						
6	Domestic			171	145	120	86	60	47	164	139	115	82	57	45		154	131	108	77	54	42		162	138	113	81	57	45		163	139	114	82	57	45		178	151	125	89	62	49
7	Import, Intercoastal and Coastwise			162	139	111	80	57	45	156	133	109	78	55	43		154	131	108	77	54	42		156	133	109	78	55	43		154	131	108	77	54	42		162	139	111	80	57	45
8	Export, Intercoastal and Coastwise			157	134	111	80	57	45	155	132	109	78	55	43		154	131	108	77	54	42		155	132	109	78	55	43		154	131	108	77	54	42		157	134	111	80	57	45
9	Warren	Ill.	1020						949							902							967							1048						1091						
10	Domestic			183	156	128	92	64	50	176	150	123	88	62	48		171	145	120	86	60	47		168	143	118	84	59	46		185	157	130	93	65	51		185	157	130	93	65	51
11	Import, Intercoastal and Coastwise			179	153	123	89	63	50	173	147	121	87	61	48		171	145	120	86	60	47		168	143	118	84	59	46		171	145	120	86	60	47		179	153	123	89	63	50
12	Export, Intercoastal and Coastwise			174	148	123	89	63	50	172	146	121	87	61	48		171	145	120	86	60	47		168	143	118	84	59	46		171	145	120	86	60	47		174	148	123	89	63	50
13	Washington C. H.	Ohio	660						580							496							645							620						829						
14	Domestic			141	120	99	71	49	39	132	112	92	66	46	36		122	104	85	61	43	34		135	115	95	68	47	37		135	115	95	68	47	37		154	131	108	77	54	42
15	Import, Intercoastal and Coastwise			130	112	88	64	46	37	124	106	86	62	44	35		122	104	85	61	43	34		124	106	86	62	44	35		122	104	85	61	43	34		130	112	88	64	46	37
16	Export, Intercoastal and Coastwise			125	107	88	64	46	37	123	105	86	62	44	35		122	104	85	61	43	34		123	105	86	62	44	35		122	104	85	61	43	34		125	107	88	64	46	37
17	Wolcottville	Ind.	764						688							641							659							874						843						
18	Domestic			152	129	106	76	53	42	143	122	100	72	50	39		135	115	95	68	47	37		138	117	97	69	48	38		161	137	113	81	56	44		154	131	108	77	54	42
19	Import, Intercoastal and Coastwise			143	123	98	71	50	40	137	117	96	69	48	38		135	115	95	68	47	37		137	117	96	69	48	38		135	115	95	68	47	37		143	123	98	71	50	40
20	Export, Intercoastal and Coastwise			138	118	98	71	50	40	136	116	96	69	48	38		135	115	95	68	47	37		136	116	96	69	48	38		135	115	95	68	47	37		138	118	98	71	50	40
21	Youngstown	Ohio	500						424							378							462							570						676						
22	Domestic			119	101	83	60	42	33	109	93	76	55	38	30		103	88	72	52	36	28		116	99	81	58	41	32		127	108	89	64	44	35		134	114	94	67	47	37
23	Import, Intercoastal and Coastwise			111	96	75	55	39	31	105	90	73	53	37	29		103	88	72	52	36	28		105	90	73	53	37	29		125	106	88	63	44	34		111	96	75	55	39	31
24	Export, Intercoastal and Coastwise			106	91	75	55	39	31	104	89	73	53	37	29		103	88	72	52	36	28		104	89	73	53	37	29		125	106	88	63	44	34		106	91	75	55	39	31
25	GRAND TOTAL	Miles	85264						79045							73258							77795							88856						97531						
26	GRAND TOTAL	Domestic Rates		16735	14226	11724	8389	5857	4604	16043	13643	11236	8045	5615	4412		15332	13034	10740	7710	5362	4212		15729	13368	11017	7892	5512	4358		17012	14461	11911	8529	5947	4676		17526	14905	12271	8792	6139	4814
27	GRAND TOTAL	Import Rates		16049	13744	11020	7965	5629	4472	15413	13108	10808	7753	5417	4259		15211	12907	10702	7643	5311	4154		15198	12936	10623	7624	5342	4237		15401	13062	10847	7750	5328	4206		16049	13744	11020	7965	5628	4472
28	GRAND TOTAL	Export Rates		15619	13319	11020	7965	5629	4472	15403	13103	10508	7753	5417	4261		15296	13006	10703	7643	5312	4154		15129	12870	10623	7624	5341	4236		15493	13162	10848	7750	5384	4208		15619	13319	11020	7965	5628	4472
29	GRAND TOTAL 6 Classes Domestic Rates					61535						58994							56390							57876							62530							64447			
30	GRAND TOTAL 6 Classes Import Rates					58879						56758							55928							55960							56605							58878			
31	GRAND TOTAL 6 Classes Export Rates					58624						56745							56114							55823							56845							58023			
32	Average Miles		864.4						745.7							691.1							733.9							838.3						920.1						
33	Average Domestic Rates			157.9	134.2	110.6	79.1	55.3	43.4	151.3	128.7	106.0	75.9	53.0	41.6		144.6	123.0	101.3	72.7	50.6	39.7		148.4	126.1	103.9	74.5	52.0	41.1		160.5	136.4	112.4	80.5	56.1	44.1		165.3	140.6	115.8	82.9	57.9	45.4
34	Average Import, Intercoastal and Coastwise Rates			151.4	129.7	104.0	75.1	53.1	42.2	145.4	123.7	102.0	73.1	51.1	40.2		143.5	121.8	101.0	72.1	50.1	39.2		143.4	122.0	100.2	71.9	50.4	40.0		145.3	123.2	102.3	73.1	50.8	39.7		154.4	129.7	104.0	75.1	53.1	42.2
35	Average Export, Intercoastal and Coastwise Rates			147.3	125.7	104.0	75.1	53.1	42.2	145.3	123.6	102.0	73.1	51.1	40.2		144.3	122.7	101.0	72.1	50.1	39.2		142.7	121.4	100.2	71.9	50.4	40.0		146.2	124.2	102.3	73.1	50.8	39.7		147.3	125.7	104.0	75.1	53.1	42.2
	Percent of Domestic Rates																																									
36	Import Rates			95.9	96.6	94.0	94.9	96.0	97.2	96.1	96.1	96.2	96.3	96.4	96.6		99.2	99.0	99.7	92.2	99.0	98.7		96.2	96.3	96.4	96.5	96.9	97.3		90.5	90.3	91.9	90.8	90.6	90.0		91.6	92.2	89.8	90.6	91.7	93.0
37	Export Rates			93.3	93.7	94.0	94.9	96.0	97.2	96.0	96.0	96.2	96.3	96.4	96.6		99.8	99.8	99.7	99.2	99.0	98.7		96.2	96.3	96.4	96.5	96.9	97.3		91.1	91.1	91.0	90.8	90.6	90.0		89.1	89.4	89.8	90.6	91.7	93.0
38	Average of 6 Classes Import Rates					95.7						96.2							99.2							96.7							90.5							91.4			
39	Average of 6 Classes Export Rates					94.3						96.2							99.5							96.5							90.9							90.0			

Tariff Authorities

I.N. Doe's	I.C.C. 362
W. S. Curlett's	I.C.C. A-574
"	I.C.C. A-694
"	I.C.C. A-744
"	I.C.C. A-766
"	I.C.C. A-445
"	I.C.C. A-755
B.T.Jones'	I.C.C. 3642.

Tariff Authorities

I.N. Doe's	I.C.C. 362
W. S. Curlett's	I.C.C. A-574
"	I.C.C. A-694
"	I.C.C. A-744
"	I.C.C. A-766
"	I.C.C. A-445
"	I.C.C. A-755
B.T.Jones'	I.C.C. 3642

Statement of Class Rates in Effect December 2, 1931, or Prior to Rates Published to Rates Published Under I.C.C. Docket 15879, Between Representative Points In Central Freight Assn. Territory Located in Former McGraham Formula cGraham Formula Percentage Groups and New York, Philadelphia, Baltimore Albany, Norfolk and Boston Applicable on Domestic, Import and mestic, Import and Export Traffic and the Short Line Distances.

Rates in Cents Per 100 P n Cents Per 100 Pounds

EXHIBIT No. 9
WITNESS: .....
I.C.C. DOCKET No. 29117
CONSISTING OF 1 PAGE

Item	Between and			New York, N. Y. CLASSES						Miles	Philadelphia, Pa. CLASSES						Miles	Baltimore, Md. CLASSES					
				1	2	3	4	5	6		1	2	3	4	5	6		1	2	3	4	5	6
	Former Percentage Group	Representative Point in Group																					
1	66	Youngstown,	E.B.	500	94½	83	63	41	37½	31½	424	92½	81	61	42	35½	29½	378	91½	80	60	41	34½	28½
2		Ohio																						
3	67		W.B.	500	95	83½	63½	44	38	32	424	89	77½	61½	42	36	30	378	87	75½	60½	41	35	29
4																								
5			E.B.	562	101	88½	67	47	40	33½	490	99	86½	65	45	38	31½	444	98	85½	64	44	37	30½
6	71	Cleveland,																						
7		Ohio	W.B.	562	101	88½	67	47	40	33½	490	95	82½	65	45	38	31½	444	93	80½	64	44	37	30½
8																								
9																								
10	74	Columbus,	E.B.	621	109½	96	73	51	43½	36½	545	107½	94	71	49	41½	34½	479	106½	93	70	48	40½	33½
11	78	Ohio	W.B.	621	111	97	73½	51½	44	37	545	105	91	71½	49½	42	35	479	103	89	70½	48½	41	34
12																								
13		Cincinnati,	E.B.	724	123½	108½	82	57½	49	41½	644	121½	106½	80	55½	47	39½	560	120½	105½	79	54½	46	38½
14	87	Ohio	W.B.	724	123½	108½	82	57½	49	41½	644	117½	102½	80	55½	47	39½	560	115½	100½	79	54½	46	38½
15																								
16		Indianapolis,	E.B.	799	132	116	88	61½	52½	44	723	130	114	86	59½	50½	42	650	129	113	85	58½	49½	41
17	93	Ind.	W.B.	799	132	116	88	61½	52½	44	723	126	110	86	59½	50½	42	650	124	108	85	58½	49½	41
18																								
19		Chicago,	E.B.	890	142	124½	94½	66	56½	47½	814	140	122½	92½	64	54½	45½	767	139	121½	91½	63	53½	44½
20	100	Ill.	W.B.	890	142	124½	94½	66	56½	47½	814	136	118½	92½	64	54½	45½	767	134	116½	91½	63	53½	44½
21																								
22		St. Louis,	E.B.	1040	166	145½	110½	77	66	55½	964	164	143½	108½	75	64	53½	891	163	142½	107½	74	63	52½
23	117	Mo.	W.B.	1040	166	145½	110½	77	66	55½	964	160	139½	108½	75	64	53½	891	158	137½	107½	74	63	52½
24																								

Item	Baltimore, Md. CLASSES				Miles	Albany, N. Y. CLASSES						Miles	Norfolk, Va. CLASSES						Miles	Boston, Mass. CLASSES					
	3	4	5	6		1	2	3	4	5	6		1	2	3	4	5	6		1	2	3	4	5	6
1	60	41	34½	28½	462	90	79½	60½	42	36	30	570	⑧ 106½	93	70	48	40½	33½	646	101½	89	68	48	40½	33½
2													⑧ 94½	83	63	44	37½	31½							
3	60½	41	35	29	462	79	68½	54½	37½	32	26½	570	106½	93	70	48	40½	33½	646	S 101	88½	67	47	40	33½
4																				D ① 101	88½	67	47	40	33½
5	64	44	37	30½	468	97	85	64½	45	38½	32	636	106½	93	70	48	40½	33½	652	108	94½	72	51	43	35½
6													⑧ 101	88½	67	47	40	33½							
7	64	44	37	30½	468	79	68½	54½	37½	32	26½	636	106½	93	70	48	40½	33½	652	S 101	88½	67	47	40	33½
8																				D ① 101	88½	67	47	40	33½
9																				D ② 106	93	70½	48½	42	36
10	70	48	40½	33½	606	105	92	70	49	42	35	632	106½	93	70	48	40½	33½	790	116½	102	78	55	46½	38½
11	70½	48½	41	34	606	83½	72	56	42	32½	27½	632	106½	93	70½	48½	41	34	790	S 111	97	73½	51½	44	37
12																				D 106	93	70½	48½	42	36
13	79	54½	46	38½	707	118½	104	78½	55	47	40	657	120½	105½	79	54½	46	38½	891	130½	114½	87	61½	52	43½
14	79	54½	46	38½	707	95	83½	63½	47½	37½	32	657	107½	94½	75	51½	44	36½	891	S 123½	108½	82	57½	49	41½
15																				D 118½	104½	79	54½	47	40½
16	85	58½	49½	41	750	126½	111½	84½	59	50½	42	767	129	113	85	58½	49½	41	934	139	122	93	65½	55½	46
17	85	58½	49½	41	750	103½	91	69	49½	41	34½	767	116	102	81	55½	47½	39	934	S 132	116	88	61½	52½	44
18																				D 127	112	85	58½	50½	43
19	91½	63	53½	44½	789	136½	119½	90½	63½	54	45½	914	139	121½	91½	63	53½	44½	973	149	130½	99½	70	59½	49½
20	91½	63	53½	44½	789	113½	99½	75½	54	45	38	914	126	110½	87½	60	51½	42½	973	S 142	124½	94½	66	56½	47½
21																				D 137	120½	91½	63	54½	46½
22	107½	74	63	52½	990	159½	139½	106	74	63½	53½	996	163	142½	107½	74	63	52½	1174	173	151½	115½	81	69	57½
23	107½	74	63	52½	990	137½	120½	91½	66½	54½	46	996	150	131½	103½	71	61	50½	1174	S 166	145½	110½	77	66	55½
24																				D 161	141½	107½	74	64	54½

Tariff Authorities

E.B.—B.T. Jones, Tariff No. 218-G, I.C.C. 2253.
W.B.—W.S. Curlett's, I.C.C.A—149 and New England Frt. Assn.—T.B. Tariff No. 1-B, I.N. Doe's I.C.C.100.

EXPLANATION OF REFERENC ATION OF REFERENCE MARKS

⑧ Applies for export to Foreign Countri port to Foreign Countries, except Mexico.
S—Via Standard All Rail routes. All Rail routes.
D—Via Differential All-Rail routes thro ial All-Rail routes through Canada
① Applies other than via Detroit or Po than via Detroit or Port Huron, Mich
② Applies via Detroit or Port Huron, Mi troit or Port Huron, Mich.

EXPLANATION OF ABBREVIATIONS

E.B.—Eastbound
W.B.—Westbound

EXHIBIT No. 12
WITNESS: HODKINSON
I.C.C. DOCKET No. 29127

453

CHART SHOWING RULES GOVERNING THE APPLICATION OF EXPORT, IMPORT, INTERCOASTAL AND COASTWISE RATES AT THE NORTH ATLANTIC PORTS

APPLICATION OF EXPORT RATES

Rates will apply on property consigned for export to foreign countries, viz.:

Canal Zone of Panama, Cuba, Insular Possessions of the United States; (Philippine Islands, Puerto Rico, Hawaiian Islands and Virgin Islands), also all destination not located in: United States of America (including Alaska), Canada (including provinces of Prince Edward Island, New Brunswick and Nova Scotia), Newfoundland, Islands of Miquelon and St. Pierre.

when exported direct from ports; will only apply, except as otherwise provided, on traffic which does not leave possession of the carrier delivered by the Atlantic Port Terminal Carriers direct to the steamer or steamers' dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates, and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given.

Shipments not consigned in shipping orders or bills of lading for export, which are ordered for export after arrival at seaboard, or outer holding yard or yards, will be subject to the rates, rules and regulations applicable to export traffic or the same as would have applied had the shipment been originally consigned for export, so long as the property has not passed from the possession of the carrier and is subject to a reconsigning charge.

Export rates will also apply on shipments consigned on bills of lading for export, destined to foreign countries or foreign possessions of the United States, handled through United States Navy Yards, Naval Bases or Army Bases or delivered to United States Government vessels docked thereat on presentation of proper evidence of exportation.

All shipments consigned to ports for export are to be waybilled and bills of lading issued at the export rates,

Rate to Baltimore, Md., on export property will apply on shipments delivered to vessels directly from railroad owned piers or piers leased to and operated by the Railroad Company at Baltimore, Md.

APPLICATION OF IMPORT RATES

Import rates from the ports, will apply on property received from foreign countries, viz.:

Canal Zone of Panama;
Cuba;
Insular Possessions of the United States (Philippine Islands, Puerto Rico, Hawaiian Islands and Virgin Islands), also
All points of origin not located in:
United States of America (including Alaska);
Canada (including provinces of Prince Edward Island, New Brunswick and Nova Scotia);
Newfoundland;
Islands of Miquelon and St. Pierre

and delivered to the rail carrier direct from ship's side or dock of vessel bringing such property to origin stations or on such property received by the rail carriers from customs bonded warehouses; appraisers' stores (not internal revenue stores) or public warehouses at the port of entry (see Note A) or initial carriers' stores, or fumigation plants after having been fumigated under federal regulations and inspection, within twelve (12) months from date of entry, provided same has not been trans-shipped at any other United States port (see Note B).

The rate to be applied will be that in effect on the date property is received by the carrier for transportation, either direct to destination or to an intermediate point for transit under transit tariffs lawfully on file with the Interstate Commerce Commission.

NOTE A—In order to obtain the benefit of import rates on traffic stored in public warehouses, the owner or his agent must register such traffic at the port of entry, except as otherwise provided, with the Trunk Line Freight Inspection Bureau within twenty-five (25) days of the date such traffic arrived at such port of entry and at the time of reshipment furnish the carrier with evidence showing origin of such traffic as provided in Note C, as well as date traffic was entered at the port of entry.

It is understood the actual inspection service at Norfolk and Lambert Point, Va. is performed by the Southern Weighing and Inspection Bureau.

NOTE B—Trans-shipment, as herein mentioned, means the unloading of traffic at any port, and subsequent reshipment thereof to another port under a new bill of lading or contract of carriage, but does not mean traffic which is transferred from one vessel to another for on-carriage under the terms of the original bill of lading taken out at time of forwarding at the foreign port from which traffic cleared on the first vessel.

NOTE C—

CERTIFICATE ON IMPORT FREIGHT (Note)

Each bill of lading and shipping order covering import freight received from steamer dock, customs bonded warehouse, Appraiser's stores, initial carrier's stores, public warehouses or fumigation plants after having been fumigated under Federal regulations and inspection, entitled to an import rate or the application of import rules, regulations and charges shall bear on its face a certificate in the following form which must be signed by the shipper or his Agent:

454

IMPORT CERTIFICATE

..... hereby certify that the property covered
(I) (We)
by this receipt was imported in the .....
(kind of vessel and its name)
from ..... arriving at this port on
(name of foreign port)
..... and has not been in any private ware-
(date of arrival)
house (not public warehouse) but is transferred to railroad station direct from .....
(Steamer dock)

....
(Customs' bonded warehouse) (Appraiser's stores)

....
(Initial carrier's stores) (Public Warehouses)

or from fumigation plants after having been fumigated under Federal Regulations and inspection.

Shipper .....
By Agent .....

NOTE—In order to obtain the benefit of import rates or the application of import rules, regulations and charges, the certification referred to in this rule must be made at the time the shipment is tendered to the carrier.

Application of Intercoastal Rates From North Atlantic Ports

Rates apply on Intercoastal traffic originating at points on the Pacific Coast of the United States, Alaska and British Columbia also on traffic originating at interior Pacific Coast points moving via Pacific Coast ports, and moving via the Panama Canal, when arriving at the ports via vessel and delivered to the rail carrier direct from shipside or dock of vessel bringing such property to origin ports provided same has not been trans-shipped at any other United States port (Note).

Note—Trans-shipment as herein mentioned means the unloading of traffic at any port and subsequent reshipment thereof to another port under a new bill of lading or contract of carriage.

The rate to be applied will be that in effect on the date the property is received by the carrier.

Application of Intercoastal Rates to North Atlantic Ports

Rates will only apply on traffic destined to points on the Pacific Coast of the United States, Alaska and British Columbia also on traffic destined to interior Pacific Coast points moving via Pacific Coast ports and moving via the Panama Canal, which is delivered by the Atlantic Port Carriers to the steamer or steamers direct upon arrival at the port or if storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the Intercoastal rates, and also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which intercoastal rates apply, which traffic is handled direct from carrier's stations to steamship docks and on which required proof of trans-shipment is given.

Shipments not consigned in shipping orders or bills of lading to a point on the Pacific Coast of the United States, Alaska or British Columbia for movement via Panama Canal, which are ordered to such destinations after arrival at the seaboard or outer yard or yards, will be subject to the rates, rules and regulations that would have applied had the shipment been originally consigned for such destination at the time of forwarding from point of origin.

Application of Coastwise Rates From North Atlantic Ports

Rates will only apply on Coastwise traffic originating at South Atlantic and Gulf Ports south of Albemarle Sound, and on traffic originating at interior points moving via said ports, when arriving at said origin ports via vessel and delivered to the rail carrier direct from shipside or dock of vessel bringing such property to said origin ports, provided same has not been trans-shipped at any other United States port (Note).

Note—Trans-shipment as herein mentioned means the unloading of traffic at any port and subsequent reshipment thereof to another port under a new bill of lading or contract of carriage.

The rate to be applied will be that in effect on the date the property is received by the carrier.

Application of Coastwise Rates to North Atlantic Ports

Rates will only apply on Coastwise traffic destined to South Atlantic and Gulf Ports south of Albemarle Sound, and on traffic destined to interior points moving via said ports, which is delivered by the Atlantic Port Carriers to the steamer or steamers direct upon arrival at the port or if storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of coastwise rates, and also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which coastwise rates apply, which traffic is handled direct from carrier's station to steamship docks and on which required proof of trans-shipment is given.

Shipments not consigned in shipping order or bills of lading to coastwise points located in the United States south of Albemarle Sound, which are ordered to such destinations after arrival at the seaboard or outer yard or yards, will be subject to the rates, rules and regulations that would have applied if the shipment had been originally consigned for such destination at the time of forwarding from point of origin.

Tariff Authorities

W. S. Curlett's	I.C.C. A-574	W. S. Curlett's	I.C.C. A-747
W. S. Curlett's	I.C.C. A-625	B. T. Jones'	I.C.C. 3422
W. S. Curlett's	I.C.C. A-647	B. T. Jones'	I.C.C. 3642
W. S. Curlett's	I.C.C. A-694	B. T. Jones'	I.C.C. 3758
B.& L.E.R.R.	I.C.C. 1163	P.R.R.	I.C.C. 2663
B.& O.R.R.	I.C.C. 23376	P.R.R.	I.C.C. 2675
B.& O.R.R.	I.C.C. 23410	P.R.R.	I.C.C. 2688
B.& O.R.R.	I.C.C. 23530	P.& L.E.R.R.	I.C.C. 3325

455

EXHIBIT No. 13
WITNESS: HODKINSON
I.C.C. DOCKET No. 29117

STATEMENT SETTING FORTH THE REGULATIONS OF THE OFFICIAL TERRITORY RAIL CARRIERS SERVING THE PORT OF NORFOLK, VA. COVERING THE SERVICE OF LOADING AND UNLOADING CARLOAD FREIGHT

LIST OF OFFICIAL TERRITORY RAILROADS SERVING THE PORT OF NORFOLK

Chesapeake and Ohio Railway Company, The
Norfolk and Western Railway Company,
Norfolk & Portsmouth Belt Line Railroad Co.
Pennsylvania Railroad Co., The
Virginian Railway Co., The

HANDLING EXPENSES

All freight received or delivered at other than regular receiving or delivering stations of this company shall be loaded or unloaded by the shipper or consignee, unless this company elects to perform this service, in which case a charge of 28 cents per 2,000 pounds for unloading and for loading will be made.

NOTE:—It is understood that the loading and unloading charges above specified will be assessed on all traffic except that received at or delivered in the designated space in Railroad Company's warehouse where local traffic is usually received or delivered.

ALLOWANCE FOR LOADING BANANAS

Where the service of loading bananas into cars at Norfolk, Va., is performed by shippers for account of carriers, an allowance of $2.50 per car will be made to shippers for performing such loading service.

WHARFAGE AND HANDLING CHARGES

TRANSPORT, TRADING AND TERMINAL CORPORATION

Any charge of the Norfolk & Portsmouth Belt Line Railroad Company for wharfage, storage, loading, unloading, handling, transferring, or any service whatever at the Transport, Trading and Terminal Corporation, as per Norfolk & Portsmouth Belt Line Railroad Company Tariff 6-J, I.C.C. 105, will be in addition to the rate to or from Norfolk, Va., except that on export, import, coastwise and intercoastal traffic, any quantity, on which the freight rate is not less than 10 cents per 100 pounds, or $2.00 per ton,

wharfage charge of 1 cent per 100 pounds, and handling charge not to exceed 3 cents per 100 pounds or 60 cents per ton, will be included in the freight rate to or from Norfolk, Va., with the exceptions shown in paragraphs 1, 2 and 3 under heading "Absorption of Wharfage and Handling Charges".

LINCOLN TIDEWATER TERMINALS, INC.

Any charge of the Norfolk and Portsmouth Belt Line Railroad Company for wharfage, storage, loading, unloading, handling, transferring, or any service whatever at the Lincoln Tidewater Terminals, Inc. as per Norfolk and Portsmouth Belt Line Railroad Company's Tariff 6-J, I.C.C. 105, will be in addition to the rate to or from Norfolk, Va., except that on export, import, coastwise and intercoastal traffic, any quantity, on which the freight rate is not less than 10 cents per 100 pounds, or $2.00 per ton, wharfage charge of 1 cent per 100 pounds, and handling charge not to exceed 3 cents per 100 pounds, or 60 cents per ton, will be included in the freight rate to or from Norfolk, Va., except as shown in paragraphs 1, 2 and 3 under "Absorption of Wharfage and Handling Charges".

MUNICIPAL GRAIN ELEVATOR

Any charge of the Norfolk and Portsmouth Belt Line Railroad Company for wharfage, storage, loading, unloading, handling, transferring or any service whatever at the Municipal Grain Elevator, as per Norfolk and Portsmouth Belt Line Railroad Company's Tariff 6-J, I.C.C. 105, will be in addition to the rate to Norfolk, Va., except that on grain, in carloads, handled through the elevator direct to vessel wharfage charge of one cent per 100 pounds will be included in the freight rate to Norfolk, Va.

JONES COLD STORAGE AND TERMINAL CORPORATION (EAST WATER STREET TERMINALS), NORFOLK, VA.

On Export, Import, Intercoastal and Coastwise traffic, any quantity, handled through the Jones Cold Storage and Terminal Corporation (East Water Street Terminals), Norfolk, Va., which pays the rail carriers and connections 10 cents per 100 pounds, or over, or $2.00 per ton, or over, wharfage charge of one cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds or 60 cents per ton, will be included in the freight rate to or from Norfolk, Va., except as shown in paragraphs 1, 2 and 3 under heading "Absorption of Wharfage and Handling Charges".

SOUTHGATE TERMINAL CORPORATION, (NORFOLK DIVISION TERMINALS), NORFOLK, VA.

On Export, Import, Intercoastal and Coastwise traffic, any quantity, which pays the Rail Carriers and connections 10 cents per 100 pounds, or over, or $2.00 per ton, or over, wharfage charge of one cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds or 60 cents per ton, will be included in the freight rate to or from Norfolk, Va., except freight in tank cars and as shown in paragraphs 1, 2 and 3 under heading "Absorption of Wharfage and Handling Charges".

SECURITY WAREHOUSE CORPORATION, NORFOLK, VA.

On Export, Import, Intercoastal and Coastwise traffic, any quantity, moving through the Security Warehouse Corporation, Norfolk, Va., which pays the Rail Carriers and connection 10 cents per 100 pounds, or over, or $2.00 per ton, or over, wharfage charge of one cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds or 60 cents per ton, will be included in the freight rate to or from Norfolk, Va., except freight in tank cars and as shown in paragraphs 1, 2 and 3 under heading "Absorption of Wharfage and Handling Charges".

456 IMPERIAL TOBACCO COMPANY, LTD. (BERKLEY WAREHOUSES AND TRACKS), NORFOLK, VA.

On Export, Import, Intercoastal and Coastwise traffic, any quantity, handled through the Imperial Tobacco Company, Ltd. (Berkley Warehouses and Tracks), Norfolk, Va., which pays the Rail Carriers and connections 10 cents per 100 pounds, or over, or $2.00 per ton, or over, wharfage charge of one cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds, or 60 cents per ton, will be included in the freight rate to or from Norfolk, Va., except freight in tank cars and as shown in paragraphs 1, 2 and 3 under heading "Absorption of Wharfage and Handling Charges".

H. B. ROGERS, INC. (PORTSMOUTH DIVISION TERMINALS), PIER NO. 1, PORTSMOUTH, VA.

On Export, Import, Intercoastal and Coastwise traffic, any quantity, handled through the H. B. Rogers, Inc. (Portsmouth Division Terminals), Pier No. 1, Portsmouth, Va., which pays the Rail Carriers and connections 10 cents per 100 pounds, or over, or $2.00 per ton, or over, wharfage charge of one cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds, or 60 cents per ton, as

provided in Norfolk and Portsmouth Belt Line Tariff 6-J, I.C.C. 105, will be included in the freight rate to or from Norfolk, Va., except freight in tank cars and as shown in paragraphs 1, 2 and 3 under heading "Absorption of Wharfage and Handling Charges".

PINNERS POINT TERMINAL (PORTSMOUTH), VA.

On Export, Import, Intercoastal and Coastwise traffic, any quantity, handled through the Southern Railway Terminal at Pinners Point (Portsmouth), Va., which pays the Rail Carriers and connections 10 cents per 100 pounds or $2.00 per ton, or over wharfage charge of one cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds, or 60 cents per ton, as published in tariffs lawfully on file with the Interstate Commerce Commission, will be included in the freight rate to or from Norfolk, Va., except as shown in paragraphs 1, 2 and 3 under heading "Absorption of Wharfage and Handling Charges".

NORFOLK TIDEWATER TERMINALS, INC., PINNERS POINT (PORTSMOUTH), VA.

On Export, Import, Intercoastal and Coastwise traffic any quantity, handled through the Norfolk Tidewater Terminals, Inc., at Pinners Point (Portsmouth), Va., which pays the Rail Carriers and connections 10 cents per 100 pounds or $2.00 per ton, or over, wharfage charge of one cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds or 60 cents per ton, as published in tariffs lawfully on file with the Interstate Commerce Commission, will be included in the freight rate to or from Norfolk, Va., except as shown in paragraphs 1, 2 and 3 under heading "Absorption of Wharfage and Handling Charges".

LAMBERT POINT TERMINALS (NORFOLK & WESTERN RAILWAY COMPANY PIERS)

On Export, Import, Intercoastal and Coastwise traffic, any quantity, which pays the Rail Carriers and connections 10 cents per 100 pounds, or over, or $2.00 per ton, or over, wharfage charge of one cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds, or 60 cents per ton, will be included in the freight rate to or from Norfolk, Va., except as shown in paragraphs 1, 2 and 3 under heading "Absorption of Wharfage and Handling Charges".

NORFOLK SOUTHERN RAILROAD COMPANY'S BERKLEY TERMINALS (NORFOLK), VA.

On Export, Import, Intercoastal and Coastwise traffic, any quantity, which pays the Rail Carriers and connections

10 cents per 100 pounds, or over, or $2.00 per ton, or over, wharfage charge of one cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds, or 60 cents per ton, will be included in the freight rate to or from Norfolk, Va., except as shown in paragraphs 1, 2 and 3 under heading "Absorption of Wharfage and Handling Charges."

LAMBERT'S POINT DOCK, INC.

On Export, Import, Intercoastal and Coastline traffic, any quantity, which pays the Rail Carriers and connections 10 cents per 100 pounds, or over, or $2.00 per ton, or over, wharfage charge of one cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds, or 60 cents per ton, will be included in the freight rate to or from Norfolk, Va., except as shown in paragraphs 1, 2 and 3 under heading "Absorption of Wharfage and Handling Charges".

NORFOLK WAREHOUSE COMPANY, INC.

On Export, Import, Intercoastal and Coastwise traffic, any quantity, which pays the Rail Carriers and connections 10 cents per 100 pounds, or over, or $2.00 per ton, or over, wharfage charge of one cent per 100 pounds and handling charge not to exceed 3 cents per 100 pounds, or 60 cents per ton, will be included in the freight rate to or from Norfolk, Va., except as shown in paragraphs 1, 2 and 3 under heading "Absorption of Wharfage and Handling Charges."

ABSORPTION OF WHARFAGE AND HANDLING CHARGES

(1) (a)—Handling Charges will not be absorbed on freight in open cars, except on lumber, all kinds (including wooden logs, wooden poles, wooden ties and wooden piling), carloads (see paragraph (b)).

(b)—When stowing in open cars is required, handling charge of ½ cent per 100 pounds or 10 cents per 2000 pounds will be absorbed on lumber, all kinds (including wooden logs, wooden poles, wooden ties and wooden piling), carloads, loaded on open cars at the Lamberts Point Terminals (Norfolk & Western Railway Company Piers), Lamberts Point Docks, Inc.

(2) Wharfage and/or handling charges will not be absorbed on freight accorded lighterage, or on grain or any other inbound or outbound traffic milled, mixed, malted or stored in transit at the Transport, Trading and Terminal Corporation; Lambert's Point Docks, Inc., Lincoln Tidewater Terminals, Inc., Norfolk Warehouse Company, Inc., H. B. Rogers, Inc. (Norfolk Division Terminals); Security

Warehouse Corporation; Imperial Tobacco Company, Ltd., (Berkley Warehouse and Tracks); Norfolk Southern Railroad Company, Berkley Terminals; Jones Cold Storage and Terminal Corp. (East Water Street Terminals); Lamberts Point Terminals (Norfolk & Western Railway Company Piers), Norfolk, Va.; H. B. Rogers, Inc. (Portsmouth Division Terminals); Pier No. 1, Pinners Point Terminal, Portsmouth, Va., Norfolk Tidewater Terminals, Inc., Pinners Point (Portsmouth), Va.

457 (3) In all other respects on Export, Import, Intercoastal and Coastwise traffic the wharfage, handling, storage and/or other charges applicable at the Transport, Trading and Terminal Corporation; Lambert's Point Docks, Inc., Lincoln Tidewater Terminals, Inc., Norfolk Warehouse Company, Inc., H. B. Rogers, Inc., (Norfolk Division Terminals) Security Warehouse Corporation; Imperial Tobacco Company, Ltd.; (Berkley Warehouses and Tracks); Norfolk Southern Railroad Company, Berkley Terminals; Jones Cold Storage and Terminal Corporation, (East Water Street Terminal); Lambert's Point Terminals, (Norfolk & Western Railway Company Piers), Norfolk, Va., H. B. Rogers, Inc., (Portsmouth Division Terminals), Pier No. 1; Pinners Point Terminal, Portsmouth, Va., and Norfolk Tidewater Terminals, Inc., Pinners Point (Portsmouth), Va., will be in addition to the rate to and from Norfolk, Va., or Portsmouth, Va., as the case may be, published in tariffs lawfully on file with the Interstate Commerce Commission.

TARIFFS IN WHICH SPECIFIC RULES AND REGULATIONS ARE PUBLISHED

C. & O. Ry. I.C.C. No. 12811
N. & W. Ry. I.C.C. No. 9179
P. R. R. I.C.C. No. 2613
Vgn. Ry. I.C.C. No. 2196
Nor. & Ports. Belt Line R. R. I.C.C. No. 105

EXHIBIT No. 14
WITNESS: HODKINSON
I.C.C. DOCKET No. 29117
PAGE 1 OF 3 PAGES

STATEMENT SETTING FORTH THE REGULATIONS OF THE RAIL CARRIERS SERVING THE PORT OF BALTIMORE, MARYLAND, COVERING THE SERVICE OF LOADING AND UNLOADING CARLOAD FREIGHT

LIST OF RAILROADS SERVING PORT OF BALTIMORE, MD.

The Baltimore and Ohio Railroad Company
Canton Railroad Company
The Pennsylvania Railroad Company
Western Maryland Railway Company

ALLOWANCES TO COVER LOADING OF BANANAS

Where the service of loading bananas into cars at Baltimore, Md. is performed by shippers for account of carriers, an allowance of $2.50 per car will be made to shippers for performing such loading service.

LOADING AND UNLOADING OF FREIGHT DESTINED TO OR RECEIVED FROM FOREIGN PORTS

Unless otherwise provided by tariffs lawfully on file with the Interstate Commerce Commission, Public Service Commission of Maryland or herein, on traffic to or from foreign ports which pays the Railroads serving the Port of Baltimore, Md. and their connections not less than 10 cents per 100 pounds, or $2.00 per ton, the freight rate will include loading from lighters or platform or piers under cover to cars or from open piers to box cars, or unloading from cars to platform of piers under cover or to lighters or from box cars to open piers, EXCEPT Oils, in bulk, at open or closed piers; Import Lumber not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood. (See heading "Loading charges on lumber") and traffic handled to or from open cars at open piers.

On traffic paying less than 10 cents per 100 pounds or $2.00 per ton when the railroad performs the service there will be an additional charge of 55 cents per ton for loading or unloading of cars; the total labor and freight charges not to exceed 10 cents per 100 pounds or $2.00 per ton EXCEPT Oils, in bulk at open or closed piers; Import Lumber not otherwise indexed by name in Official Classification, (including Wooden Logs, Wooden Poles, Wooden Piling and

Wooden Ties) and Pulpwood (see heading "loading charges on lumber"), and traffic handled to or from open cars at open piers.

On property moving under freight rates, which are restricted to not include labor of loading and unloading, if the services performed by the railroad, there will be an additional charge of 55 cents per ton of 2000 pounds, for loading from lighters or platform of piers under cover to cars or from open piers to box cars, or unloading from cars to platform of piers under cover or to lighters or from box cars to open piers, except on Oils, in bulk at open or closed piers; Import Lumber not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood (see heading "loading charges on lumber"), and traffic handled to or from open cars at open piers.

On all property delivered to or received from dray or lighter which does not move to or from this company's piers by rail, when the railroad performs the labor of loading or unloading, a charge of 55 cents per 2000 pounds, subject to a minimum charge of 55 cents on any one shipment, will be assessed.

Unless otherwise provided by tariffs lawfully on file with the Interstate Commerce Commission, Public Service Commission of Maryland, or herein, on traffic to or from foreign ports which pays the railroads serving Port of Baltimore, Md., and their connections not less than 10 cents per 100 pounds, or $2.00 per ton, the freight rate will include the labor cost of 70 cents per 2000 pounds on package freight except commodities listed below and 75 cents per 2000 pounds on bulk freight and commodities listed:

Bones, in bulk,	Soda, nitrate of, in bags,
Brick, loose,	Staves, loose,
Glassware, in packages,	Steel, Greased, not boxed
Hides, loose or in bundles,	or crated,
Lath, Metal, in bundles,	Ties, Wire, in bundles,
Lumber, loose,	Tile, loose,
Slate, loose,	Wire, barbed.

For loading from pier to car of import traffic (see Note) and for unloading from car to pier of export traffic on piers of the Canton Railroad whether operated by the Canton Railroad or Steamship Companies or Pier Companies; will not apply on Oils, in bulk, in open or closed piers, or on traffic handled to or from open cars on open piers, or to or from open cars on outside uncovered tracks which are a part of covered piers, on the Canton Railroad.

NOTE:—Cost of labor for loading import lumber, not otherwise indexed by name in Official Classification including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties), and Pulpwood, into or on cars will be in addition to the lawfully published freight rate.

LOADING AND UNLOADING DOMESTIC AND COASTWISE FREIGHT

Unless otherwise provided in tariffs lawfully on file with the Interstate Commerce Commission, Public Service Commission of Maryland or herein, rates to and from Baltimore, Md., which pay the Railroads serving the port of Baltimore, Md. and their connections 10 cents per 100 pounds or $2.00 per ton, or higher, will include loading from lighter or platform of pier under cover to cars, or from open piers to box cars, or unloading from cars to platform of pier under cover or to lighter or from box cars to open pier EXCEPT Oils, in bulk at open or closed piers; Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood (see heading "Loading charges on lumber").

On traffic paying less than 10 cents per 100 pounds or $2.00 per ton, when the railroad performs the service, there will be an additional charge for loading or unloading of cars of 55 cents per ton which must be added to the freight rate to or from Baltimore, Md. The total charge, however, in such cases shall not exceed 10 cents per 100 pounds or $2.00 per ton, except on articles for which specific charges are named in the following paragraphs and Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood (see heading "Loading charges on lumber"), and further that (except articles for
459 which specific charges are named in the following paragraphs) and Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood (see heading "Loading Charges on Lumber"), the provisions of this Item will not apply on freight handled from or to open cars at open piers or on Oils, in bulk, at open or closed piers.

On property moving under freight rates, which are restricted to not include labor of loading and unloading, if the service is performed by the railroad, there will be an additional charge of 55 cents per ton of 2000 pounds for loading from lighters or platform of piers under cover

to cars or from open piers to box cars, or unloading from cars to platform of piers under cover or to lighters or from box cars to open piers, except on Oils, in bulk at open or closed piers; Lumber not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood (see heading "Loading Charges on Lumber"), and traffic handled to or from open cars at open piers.

Domestic bulk freight, in carload lots, discharged from ship docked at Canton Piers, Md., Jackson's Wharf, Md., Locust Point Marine Terminus, Md., and Fells Street Station, Md., will be loaded into cars at the expense of the Railroad Company when the rate applicable from Baltimore, Md., to destination is not less than 10 cents per 100 pounds or $2.00 per ton, except Oils, in bulk, at open or closed piers and other traffic handled to or from open cars at open piers.

On all property delivered to or received from dray or lighter which does not move to or from railroad company's piers by rail, when the railroad performs the labor of loading or unloading; a charge of 55 cents per 2000 pounds, subject to a minimum charge of 55 cents on any one shipment, will be assessed.

Bulk freight, which has been imported, stored in other than railroad warehouses or piers, when lightered to railroad terminals for shipment, will be governed by "Loading and Unloading of freight destined to or received from Foreign Ports".

A labor charge of 2¾ cents per 100 pounds will be assessed except as otherwise provided herein, on bulk freight and articles which cannot be classified as in packages.

The charge for handling heavy shipments of Boilers and Machinery will be as follows:

Weighing 3 tons or over and not exceeding 10 tons	$11.00 per car.
Over 10 tons and not exceeding 20 tons	22.00 per car.
Over 20 tons and not exceeding 25 tons	33.00 per car.
Over 25 tons, shippers must make own arrangements for handling.	
Boats and Launches, shippers must make own arrangements for handling.	

Unless otherwise provided by tariffs lawfully on file with the Interstate Commerce Commission, Public Service Commission of Maryland, or herein, on carload coastwise freight which moves over the Railroads and pays the rail-

roads serving the Port of Baltimore, Md., and their connection not less than 10 cents per 100 pounds or $2.00 per ton, the freight rate will include the labor cost of 70 cents per 2000 pounds on package freight, except the following commodities:

Bones, in bulk,	Soda, Nitrate of, in bags,
Brick, loose,	Staves, loose,
Glassware, in packages,	Steel, Greased, not boxed or crated,
Hides, loose or in bundles,	Ties, Wire, in bundles,
Lath, Metal, in bundles,	Tile, loose,
Lumber, loose,	Wire, barbed.
Slate, loose,	

and 75 cents per 2000 pounds on bulk freight and the aforementioned excepted commodities, for loading from pier to car (see Note) and unloading from car to pier on piers of the Canton Railroad, whether operated by the Canton Railroad or Steamship Companies or Pier Companies (Will not apply on Oils, in bulk, at open or closed piers, or on traffic handled to or from open cars on open piers, or to or from open cars on outside uncovered tracks which are a part of covered piers, on the Canton Railroad).

NOTE:—Cost of loading inbound domestic lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood, into or on cars will be in addition to the lawfully published freight rate.

LOADING CHARGES ON LUMBER

(a) On Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood, paying rate of 10 cents per 100 pounds or $2.00 per 2000 pounds, or higher, a charge of 50 cents per 2000 pounds for loading on open cars direct from vessel and $1.00 per 2000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters, will be assessed in addition to the freight charge.

(b) On Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood, paying rate of less than 10 cents per 100 pounds, or $2.00 per 2000 pounds, a charge of 55 cents per 2000 pounds (the total charge, however, not to exceed 12½ cents per 100 pounds or $2.50 per 2000 pounds) for loading on open cars placed alongside of vessel, will be assessed. A charge of $1.00 per 2000 pounds (total charge not to exceed 15 cents per 100

pounds or $3.00 per 2000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed. The above charges will be in addition to the freight charges.

LOADING AND UNLOADING PACIFIC INTERCOASTAL FREIGHT

Unless otherwise provided in lawfully published tariffs or herein, rates to and from Baltimore, Md., which pays the railroad serving the Port of Baltimore, Md. and their connections 10 cents per 100 pounds, or $2.00 per ton, or higher, will include loading from lighter or platform of pier under cover to cars, or from open pier to box cars, or unloading from cars to platform of pier under cover or to lighter, or from box cars to open piers. (See Heading "Loading Charges on Lumber").

Bulk freight, in carload lots, discharged from ship docked at Canton Piers, Md., Jackson's Wharf, Md., Locust Point Marine Terminus, Md., and Fells St. Station, Md., will be loaded into cars at the expense of the Railroad Company when the rate applicable from Baltimore, Md., to destination is not less than 10 cents per 100 pounds or $2.00 per ton, except traffic handled to or from open cars at open piers (see heading "Loading Charges on Lumber").

On freight paying less than 10 cents per 100 pounds or $2.00 per ton, when the railroad performs the service, there will be an additional charge for such loading or unloading of cars of 55 cents per ton which must be added to the freight rate to or from Baltimore, Md., the total charge, however, in such cases not to exceed 10 cents per 100 pounds, or $2.00 per ton (See heading "Loading Charges on Lumber").

On property moving under freight rates, which are restricted to not include labor of loading and unloading, if the service is performed by the railroad, there will be an additional charge of 55 cents per ton of 2,000 pounds, for loading from lighters or platform of piers under cover to cars or from open piers to box cars, or unloading from cars to platform of piers under cover or to lighters or from the box cars to open piers (see heading "Loading Charges on Lumber").

460

LOADING CHARGES ON LUMBER

(a) On Lumber, not otherwise indexed by name in Official Classification (including wooden logs, wooden poles, wooden ties and wooden piling) and Pulpwood, paying rate of 10 cents per 100 pounds or $2.00 per 2000 pounds, or higher, a charge of 50 cents per 2000 pounds for loading on open

cars direct from vessel and $1.00 per 2000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters, will be assessed in addition to the freight charge.

(b) On lumber, not otherwise indexed by name in Official Classification (including wooden logs, wooden poles, wooden ties and wooden piling) and Pulpwood, paying rate of less than 10 cents per 100 pounds, or $2.00 per 2000 pounds, a charge of 55 cents per 2000 pounds (the total charge, however, not to exceed 12½ cents per 100 pounds or $2.50 per 2000 pounds) for loading on open cars placed alongside of vessel, will be assessed. A chardge of $1.00 per 2000 pounds (total charge not to exceed 15 cents per 100 pounds or $3.00 per 2000 pounds) for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed. The above charges will be in addition to the freight charges.

On all property delivered to or received from dray or lighter which does not move to or from this company's piers by rail, when the railroad performs the labor of loading or unloading, a charge of 55 cents per 2000 pounds, subject to a minimum charge of 55 cents on any one shipment, will be assessed.

The Railroad Company will not load or unload freight handled to or from open cars at open piers, except inbound Lumber (see heading "Loading Charges on Lumber"), or oils, in bulk, at open or closed piers.

The minimum charge on any one shipment will be 55 cents.

Unless otherwise provided by tariffs lawfully on file with the Interstate Commerce Commission, or herein, on carload intercoastal freight, which pays the railroads serving the Port of Baltimore, Md., and their connections not less than 10 cents per 100 pounds, or $2.00 per ton, the freight rate will include the labor cost of 47 cents per 2000 pounds on package freight except commodities listed below and 51 cents per 2000 pounds on bulk freight and the following commodities:

Bones, in bulk.
Brick, loose,
Glassware, in packages.
Hides, loose or in bundles
Lath, Metal, in bundles,
Lumber, loose,
Slate, loose.
Soda, nitrate of, in bags.
Staves, loose,
Steel, Greased, not boxed or crated,
Ties, Wire, in bundles.
Tile, loose,
Wire, barbed.

for loading from pier to car, and unloading from car to pier on the Canton Railroad, whether operated by the Canton Railroad or Steamship Companies or Pier Companies; will not apply on traffic handled to or from open cars on open piers or to or from open cars on outside uncovered tracks which are a part of covered piers, or on Oils, in bulk, at open or closed piers, on the Canton Railroad.

The cost of labor for loading, Pacific Intercoastal Lumber, not otherwise indexed by name in Official Classification (including wooden logs, wooden poles, wooden piling and wooden ties) and Pulpwood, carloads, into or on cars, will be in addition to the lawfully published freight rates.

LIST OF TARIFFS IN WHICH THE SPECIFIC RULES AND REGULATIONS ARE PUBLISHED

B.& O.R.R. I.C.C. Nos. 23480 and 23367.
Canton R.R. I.C.C. No. 106.
Penna. R.R. I.C.C. Nos. 2685 and 2616.
West. Md. Ry. I.C.C. Nos. 8398, 8727 and 8742.

461

EXHIBIT No. 15
WITNESS: HODKINSON
I.C.C. DOCKET No. 29117

STATEMENT SETTING FORTH THE REGULATIONS OF THE RAIL CARRIERS SERVING THE PORT OF PHILADELPHIA, PA.–CAMDEN, N. J., COVERING THE SERVICE OF LOADING AND UNLOADING CARLOAD CARRIERS

LIST OF RAILROADS SERVING PORT OF PHILADELPHIA, PA.–CAMDEN, N. J.

Baltimore and Ohio Railroad,
The Pennsylvania Railroad Company,
The Reading Company,
Pennsylvania–Reading Seashore Lines.

LOADING OR UNLOADING ATLANTIC COASTWISE DOMESTIC TRAFFIC MOVED VIA WATER LINES

The carriers will not assume the cost of loading to cars or unloading from cars of Atlantic coastwise domestic traffic, except traffic forwarded from or delivered to piers by regular lines.

Unless otherwise provided for by tariffs lawfully on file with the Interstate Commerce Commission or State Commissions, or herein, traffic received or delivered to the carriers piers from or to regularly established Steamship Lines, which pays the carriers from Philadelphia, Pa., on

inbound traffic received from said steamship lines at Philadelphia, Pa., or to Philadelphia, Pa., on outbound traffic delivered to said Steamship lines 10 cents per 100 pounds, or $2.00 per ton, or higher, will include loading or unloading from piers to cars or cars to piers. (Subject to regulations under heading "Loading Charges on Lumber")

Where the carriers received 13½ cents per 100 pounds or $2.70 per ton or higher, the service of both loading and unloading will be performed free on the same shipment at stations in Philadelphia, Pa., where the carriers are required by tariffs to perform such service. (Subject to regulations under heading "Loading Charges on Lumber")

On traffic paying less than 10 cents per 100 pounds or $2.00 per ton when the carrier performs the service there will be an additional charge for loading or unloading from piers to cars or cars to piers of 70 cents per ton which must be added to the freight rate; the total charge, however, in such case not to exceed 10 cents per 100 pounds or $2.00 per ton. (Subject to regulations under heading "Loading Charges on Lumber")

On traffic paying less than 13½ cents per 100 pounds or $2.70 per ton when the rail carriers perform the service of both loading and unloading on the same shipment, at stations in Philadelphia, Pa., where the rail carriers are required by Tariff lawfully on file with the Interstate Commerce Commission or State Commissions, to perform such service, there will be a charge of 70 cents per ton for each service of loading and unloading, which must be added to the freight rate; the total charge, however, in such case not to exceed 13½ cents per 100 pounds or $2.70 per ton (Subject to regulations under heading "Loading Charges on Lumber"). The rail carrier reserves the right to perform this service with their own facilities.

On property moving under freight rates, which are restricted to not include labor of loading and unloading, if the service is performed by the railroad, there will be an additional charge of 70 cents per ton (See Note) for loading from Piers to cars or unloading from cars to Piers when the traffic is forwarded from or delivered to the rail carriers Piers by regularly established Steamship Lines.

NOTE:—On Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood, charges of 55 cents per ton of 2000 pounds for loading on open cars direct from vessel and $1.00 per ton of 2000

pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed in addition to the freight charges.

These regulations will not apply on:

Freight in bulk, other than Sulphur and Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood, and traffic loaded in open cars at uncovered piers or unloaded at uncovered piers from open cars. (Subject to regulations under heading "Loading Charges on Lumber")

Oils, in bulk, at either open or closed piers.

Loading Charges on Lumber

(a) On Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood, paying rate of 10 cents per 100 pounds or $2.00 per 2000 pounds, or higher, a charge of 50 cents per 2000 pounds for loading on open cars direct from vessel and $1.00 per 2000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters, will be assessed in addition to the freight charge.

(b) On Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood, paying rate of less than 10 cents per 100 pounds, or $2.00 per 2000 pounds, a charge of 55 cents per 2000 pounds, (the total charge, however, not to exceed 12½ cents per 100 pounds or $2.50 per 2000 pounds) for loading on open cars placed alongside of vessel, will be assessed. A charge of $1.00 per 2000 pounds (total charge not to exceed 15 cents per 100 pounds or $3.00 per 2000 pounds) for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed. The above charges will be in addition to the freight charges.

Loading or Unloading Intercoastal Traffic Via Panama Canal

Unless otherwise provided by tariffs lawfully on file with the Interstate Commerce Commission or State Commissions, on Intercoastal traffic moved via Panama Canal, which pays the rail carriers from Philadelphia, Pa., on inbound traffic, or to Philadelphia, Pa., on outbound traffic, 10 cents per 100 pounds or $2.00 per ton or higher, the rate will include loading from piers to cars or unloading from

cars to piers on both carriers piers and other public piers operated by Steamship Companies, Pier Companies, City of Philadelphia, Pa., City of Camden, N. J., or individuals (excepting piers controlled by the owners of the traffic). (Subject to regulations under heading "Loading Charges on Lumber").

462 Where the rail carriers receive 13½ cents per 100 pounds or $2.70 per ton or higher, the service of both loading and unloading will be performed free on the same shipment at stations in Philadelphia, Pa., where the carriers are required by Tariffs to perform such service. (Subject to regulations under heading "Loading Charges on Lumber").

On traffic paying less than 10 cents per 100 pounds or $2.00 per ton when the carriers perform the service, there will be an additional charge for loading or unloading of 70 cents per ton which must be added to the freight rate; the total charge, however, in such case not to exceed 10 cents per 100 pounds or $2.00 per ton. (Subject to regulations under heading "Loading Charges on Lumber").

On traffic paying less than 13½ cents per 100 pounds or $2.70 per ton, when the rail carriers perform the service of both loading and unloading on the same shipment, at stations in Philadelphia, Pa., where the rail carriers are required by Tariffs lawfully on file with the Interstate Commerce Commission or State Commissions, to perform such service, there will be a charge of 70 cents per ton for each service of loading and unloading which must be added to the freight rate; the total charge, however, in such case not to exceed 13½ cents per 100 pounds or $2.70 per ton. (Subject to regulations under heading "Loading Charges on Lumber"). The rail carriers reserve the right to perform this service with their own facilities.

On property moving under freight rates, which are restricted to not include labor of loading and unloading, if the service is performed by the railroads, there will be an additional charge of 70 cents per ton (See Note), for loading from piers to cars or unloading from cars to piers on both carriers' piers and other public piers operated by Steamship Companies, Pier Companies, City of Philadelphia, Pa., City of Camden, N. J., or individuals (excepting piers controlled by the owners of the traffic).

NOTE:—On Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood,

charges of 55 cents per ton of 2000 pounds for loading on open cars direct from vessel and $1.00 per ton of 2000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed in addition to the freight charges.

These regulations will not apply on:

(a) Freight in bulk (except bulk clay and ores) or on pieces and packages exceeding 3 tons in weight (See Note, under head "Loading Charges on Lumber").

(b) Freight unloaded from open cars at uncovered piers, or freight other than Lumber not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood, loaded on Open Cars at uncovered piers. (Subject to regulations under heading "Loading Charges on Lumber").

(c) Oils, in bulk, at either open or closed piers.

LOADING CHARGES ON LUMBER

(a) On Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood, paying rate of 10 cents per 100 pounds or $2.00 per 2000 pounds, or higher, a charge of 50 cents per 2000 pounds for loading on open cars direct from vessel and $1.00 per 2000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters, will be assessed in addition to the freight charge.

(b) On Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood, paying rate of less than 10 cents per 100 pounds, or $2.00 per 2000 pounds, a charge of 55 cents per 2000 pounds (the total charge, however, not to exceed 12½ cents per 100 pounds or $2.50 per 2000 pounds) for loading on open cars placed alongside of vessel, will be assessed. A charge of $1.00 per 2000 pounds (total charge not to exceed 15 cents per 100 pounds or $3.00 per 2000 pounds) for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed. The above charges will be in addition to the freight charges.

NOTE:—These regulations will apply when arrangements can be made for handling shipments restricted as to weight. Arrangements must be made with the Railroad Company for handling such shipments and all inquiries in reference

thereto must contain full description of the property including weight, point of shipment, steamship line or vessel to be delivered to or received from and the name of shipper or consignee.

LOADING OR UNLOADING EXPORT AND IMPORT TRAFFIC

Unless otherwise provided by tariffs lawfully on file with the Interstate Commerce Commission or State Commissions, on traffic destined to or received from foreign ports, which pays the rail carriers from Philadelphia, Pa., on Inbound Traffic, or to Philadelphia, Pa., on Outbound Traffic, 10 cents per 100 pounds or $2.00 per ton, or higher, the rate will include loading from piers to cars or unloading from cars to piers on both carriers' piers and other public piers operated by Steamship Companies, Pier Companies, City of Philadelphia, Pa., City of Camden, N. J., or Individuals (excepting piers controlled by the owners of the traffic), (Subject to regulations under heading "Loading Charges on Lumber").

Where the rail carriers receive 13½ cents per 100 pounds or $2.70 per ton or higher, the service of both loading and unloading will be performed free on the same shipment, at stations in Philadelphia, Pa., where the rail carriers are required by tariffs lawfully on file with the Interstate Commerce Commission or State Commission to perform such service. (Subject to regulations under heading "Loading Charges on Lumber").

On traffic paying less than 10 cents per 100 pounds or $2.00 per ton when the rail carriers perform the service, there will be an additional charge for loading or unloading of 70 cents per ton which must be added to the freight rate; the total charge, however, in such case not to exceed 10 cents per 100 pounds or $2.00 per ton. (Subject to regulations under heading "Loading Charges on Lumber").

On traffic paying less than 13½ cents per 100 pounds or $2.70 per ton when the rail carriers perform the service of both loading and unloading on the same shipment, at stations in Philadelphia, Pa., where the rail carriers are required by Tariffs lawfully on file with the Interstate Commerce Commission or State Commissions to perform such service, there will be a charge of 70 cents per ton for each service of loading and unloading, which must be added to the freight rate; the total charge, however, in such cases not to exceed 13½ cents per 100 pounds or $2.70 per ton (Subject to regulations under heading "Loading Charges on Lumber"). The carriers reserve the right to perform this service with their own facilities.

On property moving under freight rates, which are restricted to not include labor of loading and unloading, if the service is performed by the railroad, there will be an
463 additional charge of 70 cents per ton (See Note), for loading from piers to cars or unloading from cars to piers on both carriers' piers and other public piers operated by Steamship Companies, Pier Companies, City of Philadelphia, Pa., City of Camden, N. J., or individuals (excepting piers controlled by the owners of the traffic).

NOTE:—On lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood, charges of 55 cents per ton of 2000 pounds for loading on open cars direct from vessel and $1.00 per ton of 2000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed in addition to the freight charges.

These regulations will not apply on:

Import traffic other than Import Lumber not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood, when loaded on open cars at uncovered piers (Subject to regulations under heading "Loading Charges on Lumber").

Export traffic when unloaded from open cars at uncovered piers.

Bulk Grain (except Flaxseed).

Pieces or packages exceeding 3 tons in weight.

Oils, in bulk, at either open or closed piers.

LOADING CHARGES ON LUMBER

(a) On Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden piling) and Pulpwood, paying rate of 10 cents per 100 pounds or $2.00 per 2000 pounds or higher, a charge of 50 cents per 2000 pounds for loading on open cars direct from vessel and $1.00 per 2000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters, will be assessed in addition to the freight charge.

(b) On Lumber, not otherwise indexed by name in Official Classification (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood, paying rate of less than 10 cents per 100 pounds, or $2.00 per 2000 pounds, a charge of 55 cents per 2000 pounds (the total charge however, not to exceed 12½ cents per 100 pounds or

$2.50 per 2000 pounds) for loading on open cars placed alongside of vessel will be assessed. A charge of $1.00 per 2000 pounds (total charge not to exceed 15 cents per 100 pounds or $3.00 per 2000 pounds) for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed. The above charges will be in addition to the freight charges.

These regulations will apply when arrangements can be made for handling shipments restricted as to weights. Arrangements must be made with the Railroad Company for handling such shipments and all inquiries in reference thereto must contain full description of the property, including weights, point of shipment, steamship line or vessel to be delivered to or received from and the name of shipper or consignee.

LIST OF TARIFFS IN WHICH THE SPECIFIC RULES AND REGULATIONS ARE PUBLISHED

B&ORR I.C.C. No. 23367-23527-23491
PRR I.C.C. No. 2658
Reading Co. I.C.C. No. 2205

464

EXHIBIT NO. 16
WITNESS: HODKINSON
I.C.C. DOCKET NO. 29117

STATEMENT SETTING FORTH THE REGULATIONS OF THE RAIL CARRIERS SERVING THE PORT OF WILMINGTON, DEL., COVERING THE SERVICE OF LOADING AND UNLOADING CARLOAD FREIGHT

LIST OF RAILROADS SERVING PORT OF WILMINGTON, DEL.

The Baltimore and Ohio Railroad Company
The Pennsylvania Railroad Company
Reading Company

LOADING OR UNLOADING OF EXPORT AND IMPORT FREIGHT

Unless otherwise provided by tariffs lawfully on file with the Interstate Commerce Commission, or herein, on freight destined to or received from foreign ports which pays the Railroads serving the Port of Wilmington, Del., and their connections 10 cents per 100 pounds or $2.00 per ton or higher, the rate will include loading from piers to cars or unloading from cars to piers at Wilmington Marine Terminal, Wilmington, Del., (See heading "Loading Charges on Lumber").

On freight paying less than 10 cents per 100 pounds or $2.00 per ton when the railroad performs the service, there will be an additional charge for loading or unloading of 70 cents per ton which must be added to the freight rate; the total charge however, in such case not to exceed 10 cents per 100 pounds or $2.00 per ton (See heading "Loading Charges on Lumber"). The Railroads serving the Port of Wilmington, Del., reserves the right to perform this service with their own facilities.

Will not apply on Import Freight other than Lumber, not otherwise indexed by name in Official Classification, (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood, carloads, when loaded in open cars at uncovered piers of export freight when unloaded from open cars at uncovered piers, or on freight in bulk (except import-bulk clay and ores), or on pieces or packages exceeding 3 tons in weight (See heading "Loading Charges on Lumber").

LOADING CHARGES ON LUMBER

(a) On lumber, not otherwise indexed by name in Official Classification (including wooden logs, wooden poles, wooden piling and wooden ties) and Pulpwood, paying rate of 10 cents per 100 pounds or $2.00 per 2000 pounds, or higher, a charge of 50 cents per 2000 pounds for loading on open cars direct from vessel and $1.00 per 2000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters, will be assessed in addition to the freight charge.

(b) On lumber, not otherwise indexed by name in Official Classification (including wooden logs, wooden poles, wooden piling and wooden ties) and Pulpwood, paying rate of less than 10 cents per 100 pounds, or $2.00 per 2000 pounds, a charge of 55 cents per 2000 pounds (the total charge, however, not to exceed 12½ cents per 100 pounds or $2.50 per 2000 pounds) for loading on open cars placed alongside of vessel, will be assessed. A charge of $1.00 per 2000 pounds (total charge not to exceed 15 cents per 100 pounds or $3.00 per 2000 pounds) for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed. The above charges will be in addition to the freight charge.

LOADING OR UNLOADING INTERCOASTAL FREIGHT MOVED VIA PANAMA CANAL

Unless otherwise provided by tariffs lawfully on file with the Interstate Commerce Commission, or herein, on inter-

coastal freight moved via Panama Canal, which pays the Railroads serving the Port of Wilmington, Del., and their connections 10 cents per 100 pounds or $2.00 per ton or higher, the rate will include loading from piers to cars or unloading from cars to piers at Wilmington Marine Terminal, Wilmington, Del., (See heading "Loading Charges on Lumber").

On freight paying less than 10 cents per 100 pounds or $2.00 per ton when the railroad performs the service, there will be an additional charge for loading or unloading of 70 cents per ton, which must be added to the freight rate; the total charge, however, in such case not to exceed 10 cents per 100 pounds or $2.00 per ton. (See heading "Loading Charges on Lumber"). The Railroads serving the Port of Wilmington, Del., reserve the right to perform this service with their own facilities.

Will not apply on freight other than Lumber, not otherwise indexed by name in Official Classification, (including wooden logs, wooden poles, wooden piling and wooden Ties) and Pulpwood, carloads, loaded in open cars at uncovered piers or on freight at uncovered piers from open cars; or on freight in bulk, or on pieces or packages exceeding 3 tons in weight. (See heading "Loading Charges on Lumber").

LOADING CHARGES ON LUMBER

(a) On lumber, not otherwise indexed by name in Official Classification (including wooden logs, wooden poles, wooden piling and wooden ties) and Pulpwood, paying rate of 10 cents per 100 pounds or $2.00 per 2000 pounds, or higher, a charge of 50 cents per 2000 pounds for loading on open cars direct from vessel and $1.00 per 2000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters, will be assessed in addition to the freight charge.

(b) On lumber, not otherwise indexed by name in Official Classification (including wooden logs, wooden poles, wooden piling and wooden ties) and Pulpwood, paying rate of less than 10 cents per 100 pounds, or $2.00 per 2000 pounds, a charge of 55 cents per 2000 pounds (the total charge, however, not to exceed 12½ cents per 100 pounds or $2.50 per 2000 pounds) for loading on open cars placed alongside of vessel, will be assessed. A charge of $1.00 per 2000 pounds (total charge not to exceed 15 cents per 100 pounds or $3.00 per 2000 pounds) for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed. The above charge will be in addition to the freight charges.

Loading and Unloading Export, Import, Intercoastal and Coastwise Freight

On property moving under freight rates, which are restricted to not include labor of loading and unloading, if the service is performed by the railroad, there will be an additional charge of 70 cents per ton (See Note) for loading from piers to cars or unloading from cars to
465 piers at Wilmington Marine Terminal, Wilmington, Del.

Note:—On Lumber, not otherwise indexed by name in Official Classification (including logs, wooden poles, wooden ties and wooden piling) and Pulpwood charges of 55 cents per ton of 2,000 pounds for loading on open cars direct from vessel and $1.00 per ton of 2,000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed in addition to the freight charges.

The Railroads serving the Port of Wilmington, Del. reserve the right to perform this service with its own facilities.

Loading and Unloading of Sulphur, in Bulk, Moving in Domestic Coastwise Service

The Railroads serving the Port of Wilmington, Del. will assume the cost of loading to cars or unloading from cars, sulphur, in bulk, at the Wilmington Marine Terminal, Wilmington, Del., moving in domestic coastwise service, when the freight rate pays the Railroads serving the Port of Wilmington, Del., and their rail connections 10 cents per 100 pounds or $2.00 per ton or higher.

Where the Railroads serving the Port of Wilmington, Del., and their rail connections receive less than 10 cents per 100 pounds or $2.00 per ton, there will be an additional charge for loading or unloading from piers to cars or cars to piers at the Wilmington Marine Terminal, Wilmington, Del., of 70 cents per ton, which must be added to the freight charges: the total charge, however, in such case not to exceed 10 cents per 100 pounds or $2.00 per ton.

These Regulations will not apply on traffic loaded in open cars at uncovered piers, or unloaded at uncovered piers from open cars. (See heading "Loading Charges on Lumber").

List of Tariffs in Which the Specific Rules and Regulations are Published

B.&O.R.R. I.C.C. No. 23528.
Pennsylvania R.R. I.C.C. No. 2665.
Reading Company I.C.C. No. 2205.

466

EXHIBIT No. 17
WITNESS: HODKINSON
I.C.C. DOCKET 29117

STATEMENT SETTING FORTH THE REGULATIONS OF THE RAIL CARRIERS SERVING THE PORT OF CHESTER—MARCUS HOOK, PA., COVERING THE SERVICE OF LOADING AND UNLOADING CARLOAD FREIGHT

LIST OF RAILROADS SERVING PORT OF CHESTER, PA.

Pennsylvania Railroad Company,
The Reading Company.

LOADING AND UNLOADING ATLANTIC COASTWISE DOMESTIC TRAFFIC MOVED VIA WATER LINES

Unless otherwise provided for by the tariffs lawfully on file with the Interstate Commerce Commission or State Commission, or herein, on coastwise traffic received or delivered to Railroad piers, which pays the rail carrier and its connections 10 cents per 100 pounds or $2.00 per ton or higher, the rate will include loading or unloading from piers to cars or cars to piers, except Lumber, not otherwise indexed by name in Official Classification I.C.C.—O.C. 60, Pa. P.U.C.—O.C. 60, (A. H. Greenly, Agent) (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood, carloads, and freight in bulk, and except all traffic loaded or unloaded from or to open cars at uncovered piers.

On traffic paying less than 10 cents per 100 pounds or $2.00 per ton, there will be an additional charge for loading or unloading from piers to cars or cars to piers of 70 cents per ton, which must be added to the freight rates, total charge, however, in such cases not to exceed 10 cents per 100 pounds or $2.00 per ton, except lumber, not otherwise indexed by name in Official Classification, I.C.C.—O.C. 60, Pa. P.U.C.—O.C. 60 (A. H. Greenly, Agent) (including Wooden Logs, Wooden Poles, Wooden Piling and Wooden Ties) and Pulpwood, carloads, and freight in bulk, and except all traffic loaded or unloaded from or to open cars at uncovered piers.

LOADING AND UNLOADING INTERCOASTAL TRAFFIC MOVED VIA PANAMA CANAL

Unless otherwise provided by tariffs lawfully on file with the Interstate Commerce Commission or State Com-

mission or herein, on Intercoastal traffic moved via Panama Canal, which pays the rail carrier and its connections 10 cents per 100 pounds, or $2.00 per ton, or higher, the rate will include loading from piers to cars or unloading from cars to piers when the traffic is handled over carriers' piers or the piers of the South Chester Terminal and Warehousing Company, Chester, Pa.

On traffic paying less than 10 cents per 100 pounds or $2.00 per ton when the rail carrier performs the service there will be an additional charge for loading or unloading of 70 cents per ton, which must be added to the freight rate; the total charge, however, in such cases not to exceed 10 cents per 100 pounds or $2.00 per ton (subject to regulations under heading LOADING CHARGES ON LUMBER). The rail carriers reserve the right to perform this service with its own facilities.

These regulations will not apply on:

(a) Freight in bulk (except Bulk Clay and Ores), or on pieces of packages exceeding 3 tons in weight. (See Note).

NOTE—When arrangements can be made for handling of pieces or packages exceeding 3 tons each in weight, this rule will apply, when the charge for handling from or to car does not exceed 3 cents per 100 pounds. Any amount over 3 cents per 100 pounds must be assumed by the shipper, consignee or owner of the property. Such arrangements must be made with the railroad company and information furnished, giving a full description of the property, including weight, place or steamship line to be delivered to or received from, and the name of the shipper or consignee.

(b) Freight loaded in open cars at uncovered piers, or unloaded at uncovered piers from open cars (subject to regulations under heading LOADING CHARGES ON LUMBER).

LOADING CHARGES ON LUMBER

(a) On Lumber, not otherwise indexed by name in Official Classification, I.C.C.—O.C. 60. Pa. P.U.C.—O. C. 60, (A. H. Greenly, Agent), (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood, paying rate of 10 cents per 100 pounds or $2.00 per 2000 pounds, or higher, a charge of 50 cents per 2000 pounds for loading on open cars direct from vessel and $1.00 per 2000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters, will be assessed in addition to the freight charges.

(b) On Lumber, not otherwise indexed by name in Official Classification I.C.C.—O.C. 60. Pa. P.U.C.—O.C. 60,

(A. H. Greenly, Agent), (including Wooden Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood, paying rate of less than 10 cents per 100 pounds, or $2.00 per 2000 pounds, a charge of 55 cents per 2000 pounds (the total charge, however, not to exceed 12½ cents per 100 pounds or $2.50 per 2000 pounds) for loading on open cars placed alongside of vessel, will be assessed. A charge of $1.00 per 2000 pounds (total charge not to exceed 15 cents per 100 pounds or $3.00 per 2000 pounds) for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed. The above charges will be in addition to the freight charges.

LOADING AND UNLOADING EXPORT AND IMPORT FREIGHT.

Unless otherwise provided by tariffs lawfully on file with the Interstate Commerce Commission, or herein, on traffic destined to or from foreign ports, which pays the rail carrier and their connections 10 cents per 100 pounds or $2.00 per ton or higher, the rate will include loading from piers to cars or unloading from cars to piers when the traffic is handled over carriers' piers, or the piers of the South Chester Terminal and Warehousing Company, Chester, Pa. (subject to regulations under heading LOADING CHARGES ON LUMBER).

On traffic paying less than 10 cents per 100 pounds or $2.00 per ton when the railroad performs this service there will be an additional charge for loading or unloading of 70 cents per ton, which must be added to the freight rate. The total charge, however, in such case not to exceed 10 cents per 100 pounds, or $2.00 per ton. (Subject to regulations under heading LOADING CHARGES ON LUMBER.) The rail carriers reserve the right to perform this service with its own facilities.

This rule will not apply on traffic loaded in open cars at uncovered piers or unloaded at uncovered piers from open cars, or on Freight in bulk (except Import Bulk Clay, Cornwall Stone and Ores), or pieces or packages exceeding three tons in weight.

467

LOADING AND UNLOADING EXPORT AND IMPORT FREIGHT (Continued)

(a) On Lumber, not otherwise indexed by name in Official Classification I. C. C.—O. C. 60, Pa. P. U. C.—O. C. 60 (A. H. Greenly, Agent), (including wooden dogs, wooden poles, wooden ties and wooden piling) and Pulpwood, pay-

ing rate of 10 cents per 100 pounds or $2.00 per 2000 pounds, or higher, a charge of 50 cents per 2000 pounds for loading on open cars direct from vessel and $1.00 per 2000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters, will be assessed in addition to the freight charge.

(b) On Lumber, not otherwise indexed by name in Official Classification I. C. C.—O. C. 60, Pa. R. U. C.—O. C. 60 (A. H. Greenly, Agent), (including wooden logs, wooden poles, wooden ties and wooden piling) and Pulpwood, paying a rate of less than 10 cents per 100 pounds, or $2.00 per 2000 pounds, a charge of 55 cents per 2000 pounds (the total charge, however, not to exceed 12½ cents per 100 pounds or $2.50 per 2000 pounds) for loading on open cars placed alongside of vessel, will be assessed. A charge of $1.00 per 2000 pounds (total charge not to exceed 15 cents per 100 pounds or $3.00 per 2000 pounds) for loading on open cars or into closed cars from piers, intermediate storage or lighters, will be assessed. The above charges will be in addition to the Freight Charges.

EXPORT, IMPORT AND INTERCOASTAL TRAFFIC MOVING VIA PANAMA CANAL

On property moving under freight rates, which are restricted to not include labor of loading and unloading, if the service is performed by the railroad, there will be an additional charge of 70 cents per ton (See Note), for loading from piers to cars or unloading from cars to piers when the traffic is handled over piers operated by the Railroads or the piers of the South Chester Terminal and Warehousing Company.

NOTE:—On Lumber, not otherwise indexed by name in Official Classification (including Logs, Wooden Poles, Wooden Ties and Wooden Piling) and Pulpwood, charges of 55 cents per ton of 2,000 pounds for loading on open cars direct from vessel and $1.00 per ton of 2,000 pounds for loading on open cars or into closed cars from piers, intermediate storage or lighters will be assessed in addition to the freight charges.

The provisions of these regulations will not apply on—

(a) Traffic loaded on or unloaded from open cars at uncovered piers.

(b) Freight in bulk (except bulk Clay and Ores), nor on pieces or packages exceeding three (3) tons in weight, nor on pieces of extraordinary dimensions, nor upon

pieces or packages or extraordinary measurement or size as compared with the weight thereof.

LIST OF TARIFFS IN WHICH THE SPECIFIC RULES AND REGULATIONS ARE PUBLISHED

PRR I.C.C. 2689
Rdg Co. I.C.C. 2205

468

EXHIBIT No. 20
WITNESS: HODKINSON
I.C.C. DOCKET No. 29117

RULE GOVERNING THE LOADING AND UNLOADING OF FREIGHT BY RAIL CARRIERS AS PUBLISHED IN THE CONSOLIDATED FREIGHT CLASSIFICATION No. 16

Consolidated Freight Classification No. 16.
Agent A. H. Greenly I. C. C.—O. C. No. 60—Page 133

RULE No. 27
LOADING AND UNLOADING

SECTION 1—Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at C. L. ratings or rates, except where tariff of carrier at point of origin or destination or stop over station (as the case may be) provides for loading or unloading of C. L. freight by carrier.

SECTION 2—Owners are required to load into or on cars heavy or bulky freight for forwarding by rail carriers, and to unload from cars heavy or bulky freight received by rail carriers, carried at L. C. L. ratings which cannot be handled by regular station employees or at stations where carrier's loading or unloading facilities are not sufficient for handling.

SECTION 3—Shippers must observe carrier's rules regulating safe loading of freight and protection of equipment. Freight in closed cars must be so loaded as to prevent any contact with car doors during transit, and weight of lading must be approximately the same on each side.

SECTION 4—When articles are loaded on open cars, small detachable parts must be removed and placed in barrels or boxes or secured within the article. Barrels and boxes must be encircled at ends with iron straps and securely attached to the article or to floor of car. Such barrels or boxes must be specified on shipping orders and bills of lading. Fragile parts not detached must be protected.

469

EXHIBIT No. 21
WITNESS: NEILSON
I.C.C. DOCKET No. 29117
CONSISTING OF 1 PAGE

Statement Showing Industries Using Privately Owned or Privately Operated Facilities, Located within the Baltimore, Md., Port Terminal Area, having Both a Railroad Siding and a Deepwater Pier, where Carload Freight May be Interchanged Between Railroad Cars and Vessels.

INDUSTRIES

American Agricultural Chemical Co.
American Oil Co.
American Smelting and Refining Co.
American Sugar Refinery
Arcrods Corporation
Arundel Corporation
Atlas Pier and Terminal Co.
Baltimore Fidelity Warehouse Co. Canton Warehouse.
Baugh and Sons Co.
Bethlehem-Sparrows Point Shipyard, Inc.
Bethlehem Steel Co.
Central Oil Emulsion Corp. of Delaware
Co-Operative Mills Inc.
Consolidated Gas Electric Light and Power Co.
Continental Oil Co.
Davidson Chemical Co.
Fertilizer Mfg. Co-Operatives, Inc.
General Chemical Co.
Maryland Dry Dock Co.
Maryland Slag Co.
Menhaden Fish Products Co.
Mexican Petroleum Co.
Municipal Pier No. 2, Pratt Street
Municipal Pier No. 4, Pratt Street
Nelson Corp.
Petrol Corporation
Proctor & Gamble Co.
Rheems Mfg. Co.
Richfield Corporation of New York
Rukert Terminal Corporation
Seaboard Asphalt Products
Sherwood Bros.
Standard Oil Co.

Standard Slag Co.
Struven and Co., Charles M.
Sugar House Pier (Leased to Boston Iron and Metal Co.)
Terminal Warehouse Co., Bond Street Wharf
Texas Co.
Tide Water Associated Oil Co.
United States Industrial Chemical Co.
Weyerhaeuser Timber Co.

470

EXHIBIT No. 21
WITNESS:
I.C.C. DOCKET No. 29137
CONSISTING OF 1 PAGE

Statement Showing Industries Using Privately Owned or Privately Operated Facilities, Located within the Philadelphia, Pa., Port Terminal Area, Having Both a Railroad Siding and a Deepwater Pier, Where Carload Freight May be Interchanged Between Railroad Cars and Vessels

INDUSTRY

American Oil Company
Ashenfelter, W. C. & Sons
Atlantic Refining Company
Barrett Company
Baugh & Company
Bisbee Linseed Company
Cities Service Oil Company (Petty's Island, N. J.)
City Asphalt Wharf
Cramp Shipbuilding Company
DuPont De Nemours, E. I. & Company
Foreman Blades Lumber Company
Franklin Sugar Refining Company
Gulf Oil Corporation
Kensington Shipyard Company
Kieckhefer Container Company (Delair, N. J.)
Liberty Corporation
Malone, Warson & Sons
McCahan Sugar Refining Company
Motor Real Estate Company (Phila. Trans. Company)
Northern Metals Company
Ontario Land Company
Patterson, J. M. & Company
Pennsylvania Life Insurance (Formerly Hanson's Lumber Yard)

Penna Salt Manufacturing Company .....
Penna Sugar Company .....
Petrol Corporation .....
Philadelphia Coke Company .....
Philadelphia Electric Company .....
Philadelphia Gas Works .....
Philadelphia Transportation Company .....
Public Service Corp. (Camden Coke Plant) (Camden, N. J.)
Publicker Commercial Alcohol Company .....
Shell Oil Company .....
Shoemaker, M. L. .....
Smith, G. W. & Sons .....
Terminal Warehouse Company .....
Tidewater Oil Sales Company .....
Union Paving Company .....
U. S. Gypsum Company .....
Warner Company .....

471

EXHIBIT No. 21
WITNESS: .....
I.C.C. DOCKET No. 29117
CONSISTING OF 1 PAGE

Statement Showing Industries Using Privately Owned or Privately Operated Facilities, Located within the Various Port Terminal Areas Listed Below, Having Both a Railroad Siding and a Deepwater Pier, where Carload Freight may be Interchanged Between Railroad Cars and Vessels.

INDUSTRIES	*Location.*
Armstrong Cork Company	Gloucester, N. J.
Baldwin Locomotive Works	Eddystone, Penn.
DuPont De Nemours, E. I. & Company	Carney's Point, N. J.
General Chemical Company	North Claymont, Del.
Texas Company	" " "
Thomas, I. P. Company	Paulsboro, N. J.
Socony-Vacuum Oil Company	" " "

472

EXHIBIT No. 21
WITNESS: .....
I.C.C. DOCKET No. 29117
CONSISTING OF 1 PAGE

Statement Showing Industries Using Privately Owned or Privately Operated Facilities, Located within the Chester-

Marcus Hook, Pa., Port Terminal Area, Having Both a Railroad Siding and a Deepwater Pier, where Carload Freight May be Interchanged Between Railroad Cars and Vessels.

Industries	*Location*
Philadelphia Electric Company ...	Chester, Pa.
Pittsburgh Ferro Manganese Company (Delaware River Steel Co.)	" "
Scott Paper Company	" "
Sun Shipbuilding & Drydock Company	" "
Sinclair Refining Company	Marcus Hook, Pa.
Sun Oil Company	" " "

473

Exhibit No. 21
Witness: Hodkinson
I.C.C. Docker No. 29117
Consisting of 1 Page

Statement Showing Industries Using Privately Owned or Privately Operated Facilities, Located within the Port Newark and Newark, N. J., Port Terminal Areas, Having Both a Railroad Siding and a Deepwater Pier, where Carload Freight May be Interchanged Between Railroad Cars and Vessels.

Industry
American Aviation Oil Co. .....
American Lumber and Treating Co. .....
Benjamin Moore and Co. .....
Callaghan, J. P. (Atlantic Refining Co.) .....
Eagle-Picher Lead Co. .....
Federal Iron and Metal Co. .....
Federal Ship and Drydock Co. .....
Furness-Withy Co. .....
Hudson Oil Co. .....
Lockheed Overseas Corporation .....
Newark Tidewater Terminal .....
Sherwin-Williams Co. .....
Sun Oil Co. .....
Swan Finch Oil Co. .....
Texas Co. .....
United Cork Co. .....
U. S. Army Air Corps .....
Western Electric Co. .....
Weyerhaeuser Co. .....

DEFENDANT'S EXHIBIT No. 25
ICC DOCKET No. 29117
WITNESS: W. W. WOLFORD

REPRODUCTION OF UNIFORM OR STANDARD FORM OF AGREEMENT ENTERED INTO BETWEEN THE SEABOARD RY. AND SUCH TERMINAL OPERATORS AS IT MAY ELECT TO AUTHORIZE TO PERFORM THE TERMINAL SERVICES RAILROAD OBLIGATES ITSELF TO PERFORM UNDER RATES GIVEN SHIPSIDE APPLICATION.

THIS AGREEMENT MADE THIS _____ DAY OF _____, between _____, a corporation organized and existing under the laws of _____, party of the first part, hereinafter referred to as the Terminal, and severally and not jointly, _____, L. R. Powell, Jr. and Henry W. Anderson, Receivers of SEABOARD AIR LINE RAILWAY COMPANY _____, parties of the second part, each acting for itself and not jointly, hereinafter referred to as the Carriers:

WHEREAS, The Terminal operates public wharves and warehouses located on _____ Street in the City of Norfolk, Virginia,

AND WHEREAS, The Terminal is willing and desirous of permitting the use of _____ said piers and their appurtenances, as shown by _____ blueprint attached hereto and made a part hereof, as a terminal for the use of said Carriers, and to perform services for the said Carriers, as hereinafter set forth:

AND WHEREAS, The parties to this agreement desire to cooperate with each other in order that the aforesaid facilities of the Terminal may be made available to the fullest extent for the development of rail-water-borne traffic, may contribute to the upbuilding of the business of the respective companies parties to this agreement and to the business of the Port of Norfolk.

AND WHEREAS, To this end the parties hereto desire to enter into an agreement with respect to the handling and storage of merchandise of all kinds at the said Terminal;

NOW THEREFORE, This agreement witnesseth that in consideration of the premises and of the covenants and agreements on the part of each party hereto to be observed, kept and performed, it is hereby mutually covenanted, stipulated and agreed by and between the parties hereto as follows:

(1) That as to export, import, intercoastal and coastwise freight traffic (other than traffic moving on joint through rates via regular coastwise lines operating to and from North Atlantic Ports), interchanged with watercraft over the piers and/or wharves within the area outlined in

red on the attached blueprint, in carload lots, also in less than carload lots, the Carriers shall and will take and deliver the same over their lines at the same basis of rates as applies to and from their Norfolk stations immediately adjacent thereto, as contained in Carriers' published tariffs, and in the same manner and with the same promptness that they deliver and receive like traffic at any other terminal point controlled by them in the City of Norfolk. Nothing in this paragraph shall be construed to require the absorption of any terminal charges contrary to the provisions of paragraph (3) hereof.

(2) That on export, import, intercoastal and coastwise freight traffic (other than traffic moving on joint through rates via regular coastwise lines operating to and from North Atlantic ports) in carload lots, also in less than carload lots, handled by lighter or car-float to or from the piers and warehouses of the Terminal, the Carriers will make no charge for lighterage service or floating service, provided the origin or destination and route of such traffic be such as will afford the Carriers a line-haul beyond the Norfolk switching district.

(3) That on export, import, intercoastal and coastwise freight traffic (other than traffic moving on joint through rates via regular coastwise lines operating to and from North Atlantic ports) in carload lots, also in less than carload lots, handled for account of the Carriers by the Terminal where the tariffs of the Carriers provide that rates to or from their own terminals at Pinners Point, Portsmouth, or Berkeley, Virginia, as their respective interests may appear, include wharfage and/or handling charges and/or where the tariffs of the Carriers provide that wharfage and/or handling charges at their own terminals at Pinners Point, Portsmouth or Berkeley, Virginia, as their respective interests may appear, shall be absorbed in the freight rates to and/or from Norfolk, the Carriers will on traffic competitive with other Norfolk carriers absorb wharfage and/or handling charges at the piers and warehouses of the said Terminal in the same manner and to the same extent that they absorb at their own terminals at Pinners Point, Portsmouth or Berkeley, Virginia, as their respective interests may appear, such absorption, however, for wharfage charges not to exceed one (1) cent per 100 pounds, and for handling charges not to exceed three (3) cents per 100 pounds, or sixty (60) cents per ton, net or gross, as rated, and that no handling charge will be absorbed on freight in open top cars, grain in bulk or freight

in tank cars, and that the provisions in regard to absorbing the charges shall not apply to traffic that is the property of the Terminal. On traffic not competitive with other Norfolk carriers, these absorptions of the Carriers are not to exceed the amounts absorbed at their own terminals.

The absorption of all wharfage and handling charges by the Carriers shall be on basis of actual weight handled by the Terminal, except that on less than carload shipments the minimum wharfage and handling charges as published in governing tariffs will be allowed the Terminal.

(4) That where the Carriers' tariffs do not provide that wharfage and/or handling charges shall be absorbed in the freight rate, the Carriers shall publish in their tariffs the same added wharfage and/or handling charges to apply on traffic moving over the piers and warehouses of the Terminal as are effective at the Carriers' own terminals at Pinners Point, Portsmouth and Berkeley, Virginia, as their respective interests may appear. Such added wharfage and/or handling charges shall accrue to the Terminal to the extent that such allowances are provided for in Carriers' legally published tariffs and shall be calculated on basis of actual weight handled by the Terminal, except that on less than carload shipments the minimum wharfage and handling charges as published in governing tariffs will be allowed to the Terminal.

PAGE 2
DEFENDANTS' EXHIBIT No. 25
ICC DOCKET No. 29117

475 (5) The Terminal will permit the Carriers to use the portions of the premises outlined _____ on said blueprint hereto attached and heretofore made a part hereof, as terminals for the use of the Carriers, and will perform services for the Carriers as hereinafter set forth.

(6) The Terminal agrees to make every reasonable effort to load and unload cars or lighters promptly and to reduce car and lighter delay to a minimum.

(7) The Terminal shall provide the necessary organization and employees to perform the labor of loading and unloading cars of lighters and to check freight from or to the Terminal.

(8) The Terminal shall where requested by the Carriers be responsible to them for collection of freight charges as per freight bills rendered by the Carriers and any other charges lawfully assessed against the property transported; and shall comply with the laws with regard to collection

of such charges by common carriers and with lawful orders of Government authorities of competent jurisdiction affecting such collection by common carriers.

(9) The charges collected by the Terminal and due to the Carriers shall be paid by the Terminal to the Carriers in accordance with the rules and regulations prescribed by proper officers of the respective Carriers.

(10) The Terminal agrees to be responsible to the Carriers for any improper delivery of goods entrusted to its possession under the terms of this contract.

(11) That on all freight delivered to the Terminal by the Carriers, the Terminal agrees to assume the duties and obligations imposed by law upon a delivering carrier and/or as defined in rules of The Association of American Railroads (Freight Claim Division), upon a terminal carrier. It is understood that deliveries shall have been made when cars, car-floats or lighters have had their first placement at the wharf adjacent to the piers and/or warehouses of the Terminal.

(12) That on all freight to be delivered to the Carriers by the Terminal, the Terminal will be responsible until such freight is in proper shipping condition and is loaded into the cars or lighters and bill-of-lading and shipping order come into the possession of the Carriers. That in the adjustment of claims on such freight the Terminal will assume the duties and obligations imposed by law upon a forwarding carrier and/or as defined in the rules of The Association of American Railroads (Freight Claim Division) upon an initial carrier.

(13) The Terminal will indemnify the Carriers and save them harmless to the extent of their common carrier or warehouseman's liability, as the case may be, in the event of any claims for loss or damage to freight in the Terminal's possession, as per the preceding covenants, Nos. 11 and 12, including loss or damage by fire.

(14) And the Terminal, when acting as agent of the Carriers will make no charge against the owners of freight or any other persons for the storage thereof, or for other services rendered by the Terminal in connection therewith during the period of free time established by the duly published tariffs of the Carriers for whose account the freight is handled. It is understood that such free time shall be computed in accordance with the rules of the published tariffs, whether the traffic is held in cars or on lighters or on the premises of the Terminal.

(15) That with respect to export, import, intercoastal and coastwise freight handled for account of or on the

premises used by the Carriers, the Terminal shall make the same charges for any services in connection therewith as is contemporaneously maintained by the Carriers in their published tariffs for similar services at their own terminals in Norfolk, Pinners Point, Portsmouth or Berkeley, as their respective interests may appear, which shall include the collection of the same charges for storage after expiration of the free time as contained in published tariffs of the Carriers and which storage charges shall accrue to the Terminal, except that this is not intended to apply to freight which may be on long-time storage.

(16) The Terminal agrees that when freight is unloaded in the portion of the premises of the Terminal used for railroad terminal purposes and subsequently is moved from said portion to another portion of the premises, or moved from such other portion of the portion used for railroad terminal purposes, as described in the attached blueprint, the expense of such handling shall not be borne by the carriers, except as may be provided for in their published tariffs.

On such traffic received from watercraft in the areas hereinbefore designated on the blueprint attached hereto, and subsequently loaded to cars outside the said areas for rail movement, and on such traffic unloaded from cars outside the said areas which subsequently passes over said areas and is delivered to watercraft the Carriers will make the same wharfage and handling allowances as if the wharfage and handling services had been performed in the said areas, and the Carriers reserve the right to police and verify all such operations.

(17) The Terminal shall act as agents of the Carriers in the matter of receipt and delivery of the Carriers' export, import, coastwise and intercoastal freight handled under this agreement, as well as in the collection of Carriers' charges thereon, pursuant to Covenants Nos. 8 and 9, and likewise for the custody of property while on the premises used for the Carriers. After the expiration of free time, as provided in the applicable tariffs of the Carriers, the Terminal shall, when requested to, or authorized by the Carriers, remove the property from that portion of the premises used for Carriers' purposes, as hereto-

PAGE 3
DEFENDANTS' EXHIBIT NO. 25
ICC DOCKET NO. 29117

476 fore designated on the attached blueprint, and shall receipt to the Carriers therefor, and the legal possession on the part of the Carriers shall then cease and deter-

mine, and such legal possession shall then be, and thereafter continue to be, that of the Terminal, which shall hold or dispose of such property at its own responsibility and in such way as may be lawful. The intent of this part of the agreement is that after the property is removed from the premises used for railroad purposes, as described above, the property shall be considered to be in a public or licensed warehouse.

(18) The Terminal agrees that it will enforce on all traffic moving over the areas outlined on the attached blueprint, whether handled by rail, highway vehicle or river and canal carrier, the same rules and regulations, and assess and collect the same charges, as are contemporaneously enforced, assessed and collected at the Carriers' terminals at Norfolk, Pinners Point, Portsmouth or Berkeley, as their respective interests may appear, on like traffic.

It is a condition of this agreement that the Terminal shall maintain record of receipts and dispositions, and make sworn statements when required as to the collection thereon of the charges applicable to the freight transported by highway vehicles and river and canal carriers.

(19) The Terminal will execute and deliver to the Carriers a bond in such form and with such corporate surety as may be approved by the Carriers, payable to the Carriers as their respective interests may appear, in the penalty of _____ dollars ($_____), conditioned for the faithful performance of all of the covenants of the Terminal in this agreement. The Terminal will also furnish, in addition, insurance protecting the risk of the Carriers, payable to the Carriers, as their respective interests may appear to the extent of _____ dollars ($_____), the Carriers to be furnished by the Terminal with proper instrument certifying that such insurance has been put in force. And the Terminal will at all times during the continuance of this agreement keep said bond and said insurance in full force and effect.

(20) The Terminal will promptly notify the carriers in writing of the failure of any consignee to remove freight, and so long as it holds the said freight for account of the Carriers, will observe and comply with all directions with respect to such freight which may be received by it from the Carriers.

(21) The Terminal will protect and indemnify the Carriers from and against all manner of liability on account of any acts of omission or commission on the part of it,

the Terminal, with respect to merchandise handled by said Terminal under this agreement, and also from and against all manner of liability on account of receipts for merchandise issued by it.

(22) The Terminal will not perform a common carrier service or make a charge therefor until such service and charge are covered by the Carriers' tariffs lawfully effective.

(23) That wherever the services performed and charge assessed by the Terminal under this agreement are covered or are to be covered by tariffs, classifications, rules and regulations of the Carriers, it is understood that the Terminal is to act as agent of the Carriers and to strictly comply with their publications and the laws and/or lawful orders of Government authorities of competent jurisdictions, and that the Terminal will indemnify the Carriers for all damage or expense it may incur by reason of the Terminal's violation of this understanding.

(24) While the Terminal is acting as agent of the Carriers, it agrees not to act as agent for the shipper for the assembling of less than carload lots of freight into carload or less than carload shipments or as agent of the consignee for the distribution to more than one consignee of carload or less than carload freight in any manner contrary to the tariffs, classifications, rules and regulations of the Carriers.

(25) The Terminal will keep the said warehouse and premises in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received from it by the Carriers.

(26) The Terminal shall fully indemnify and save harmless the Carriers, their assigns and successors, from and against any and all claims and demands whatsoever, actions, suits, costs, recoveries, judgments, or executions, which may be made, brought, recovered, or levied against the aforesaid Carriers, their assigns or successors, or which the aforesaid Carriers, their assigns or successors, may sustain or incur by reason of the negligence of the aforesaid Terminal.

(27) The Terminal shall fully indemnify and save harmless the Carriers, their assigns and successors, from and against any and all loss and damage, which the aforesaid Carriers, their assigns or successors, may sustain or incur as a result of any disregard or violation of the aforesaid Terminal of the aforesaid matters, or any of them, specified by this agreement.

(28). It is further agreed that no assignments of this agreement shall be valid without the consent of the Carriers, and that this shall apply as well to involuntary assignments, and that upon the happenings of any legal proceedings the effect of which shall be to divest the title or possession of the said Terminal, this agreement shall, at the option of the Carriers cease and determine.

(29) This agreement shall take effect as of the____day of_____, ____, and shall continue in force and effect until terminated by any party hereto giving to the other party ninety (90) days' notice in writing of its desire and intention to terminate the same, it being understood and

477.

agreed that any party hereto may at any time cancel this contract by giving to the other party ninety (90) days' notice in writing of its intention so to do, notwithstanding the expressed provision herein set forth that this agreement shall continue in force so long as the Terminal is occupant of the said premises designated in this agreement; provided, however, that should the Terminal in any respect violate or fail to comply with any of the conditions or covenants herein contained, then this agreement shall at the option of the Carriers, or either of the Carriers as to such Carrier, on thirty (30) days' written notice to the Terminal, cease and determine and become absolutely void as to the Carriers or such Carrier as shall give such notice; provided, further, that this agreement is subject to different termination, revision or annulment as may be necessary to comply with any law, order or decision of authorities having competent jurisdiction which may now be in effect or which may be hereafter enacted affecting the service hereunder.

(30) If any disputed question shall arise between the parties concerning the construction or performance of this agreement, such question shall be submitted to the arbitrament of three disinterested persons to be chosen, one by the Terminal, one by the Carriers, and one by the arbitrators so chosen. If either of said parties shall fail to name an arbitrator within twenty (20) days after written notice to it from the other party setting forth the question or questions at issue, the arbitrator named by the party

giving such notice shall name an arbitrator in behalf of the party so in default. If the arbitrators so chosen shall fail to select a third arbitrator within twenty (20) days after the selection of the second arbitrator as aforesaid, the third arbitrator may be appointed, upon twenty (20) days' written notice by either party to the other of its intention to make application therefor, by any Judge of the United States District court for the district in which the facilities herein described shall then be located. The arbitrators shall promptly hear and decide the question or questions submitted to them, as herein provided, giving each of said parties reasonable notice of the time and place of hearing. The arbitrators shall make their award in writing, serving a copy upon each of said parties. The award of a majority of the arbitrators shall be final and binding upon the said parties. The expense of such arbitration shall be borne by the party against whom the decision of said arbitrators may be rendered, or, if a divided award be made, in the proportions fixed by the arbitrators.

(31) Where reference is made in this agreement to terminals owned by the Carriers in the City of Norfolk, Virginia, such reference shall be understood to include any terminal owned or operated by them at Pinners Point, Portsmouth, or Berkeley, Virginia.

(32) Subject to any right to cancel or terminate this contract, as provided herein, or given by law, the provisions of this contract, so far as they are applicable to the said Receivers of Seaboard Air Line Railway Company, shall be binding upon and shall inure to the benefit of the Receivers of Seaboard Air Line Railway Company (as Receivers, but not individually), and their successors, the Seaboard Air Line Railway Company and its successors, the railroad corporation which may, after the termination of the receivership of the Seaboard Air Line Railway Company, control and operate the line of railroad and appurtenant physical properties on or along which the property affected by this agreement is located, and/or to the business of which the subject matter of this agreement relates, and the successors of such railroad corporation.

(33) The said Receivers of Seaboard Air Line Railway Company further covenant unto and with the Terminal that they are authorized by order of the court appointing them as such Receivers to make and enter into this agreement and thereby to bind the estate in their trust.

IN WITNESS WHEREOF, the said parties hereto have hereunto affixed their respective seals, duly attested, the day and year first herein above written.

Signed, Seal and Delivered
in the Presence of:

478

DEFENDANTS' EXHIBIT No. 27
I.C.C. DOCKET No. 29117
WITNESS: W. W. WOLFORD

CHRONOLOGICAL HISTORY OF THE ARMY BASE, NORFOLK, VIRGINIA

The then Army Supply Base (now Army Base), Norfolk, Va., with its piers and warehouse facilities, was built by the Federal Government during World War I, and used exclusively by the U. S. Army until November 20, 1919. It neither sought nor received any wharfage and handling allowance from the railroads. It was leased to the City of Norfolk under an agreement drawn (November 20, 1919) between the War Department and the City of Norfolk, Virginia. By this agreement the City of Norfolk was granted the use of Pier 2 at the Army Supply Base and space equivalent to two warehouses which were made available for commercial business, compensation for which use was to be determined and fixed upon a tonnage or per package basis, in accordance with the schedule annexed to said agreement. The City, through its Port Director, then undertook to make arrangements with the railroads, through contract, to provide for that part of the Army Supply Base under its control as a joint terminal where export and import cargoes could be assembled and distributed without involving the expense of lighterage or car detention, etc. Before any agreement was reached or formal contract executed making the City of Norfolk a public terminal operator and the agent of the rail lines serving Norfolk, a new agreement was entered into between the City of Norfolk and the Secretary of War, cancelling the former agreement dated November 20, 1919.

This new agreement was entered into on the 10th day of August, 1920, by authority of the Secretary of War, by and between P. W. Guiney, Colonel, Infantry, for and on behalf of the U. S. of America and the City of Norfolk, State of Virginia, by C. E. Ashburner, City Manager. The August 10, 1920, agreement granted the city the right to use, employ and occupy such portions of Pier Number Two and

said warehouse space or spaces in the Army Supply Base as may be designated from time to time by the Government or its authorized representative in charge of the piers, further providing that "Pier Number One may be used on the same terms and conditions as Pier Number Two, when space is available on Pier Number One". The Government further granted the City the right to use such portion or portions of the railroad tracks at the Army Supply Base as may be designated by its authorized representative. Article 3 provided the city would make payment to the Government for use of said property, to be determined and
479 fixed upon a tonnage or per package basis, in accordance with wharfage, storage and other rates as set forth in Schedule "A" made a part of the agreement. In the same article there is also provided, "the City will make payment to the Government of 25 cents per car for each loaded car billed and moved to or from the Army Supply Base", and "the City will handle cars and freight for the Government at the same rate as charged others for similar service". Schedule "A" provided for wharfage charge on export and import traffic handled direct on the piers of one cent per hundred pounds and storage charge for the first 10 days or fraction after the expiration of free time of one cent per hundred pounds, and for each succeeding 10 days or fraction, one-half cent per hundred pounds. Schedule "A" also provided "the following rates will be paid to the War Department by the City of Norfolk, Virginia, for articles handled over piers:

"Wharfage—Fifty per cent (50%) of rate charged by the City of Norfolk, Virginia"
Storage—Sixty per cent (60%) of rate charged by the City of Norfolk, Virginia"

with other similar charges for storage in warehouses.

The City of Norfolk filed a tariff, Agent A. G. King's I.C.C. No. 1, naming the charges for terminal services to be performed by it at Norfolk, Virginia, but this tariff was protested by several public warehousemen and wharfingers at Norfolk and suspended under I&S Docket 1230 by the Interstate Commerce Commission. In the meantime, on September 21, 1920, the railroads entered into a contract with the City of Norwolk to make available for public use, the facilities at the Army Supply Base, Norfolk, Virginia, known as the municipal piers, on basis of the same rules, regulations, wharfage and handling charges, as published by the carriers over their own terminals. The contract,

among other things, provides in Article (18) "that the carriers and the Belt Line will handle traffic for the U. S. Government at the Army Supply Base at the same rates as charged others for similar service at the Army Supply Base".

It will be seen that while the railroads entered into a contract with the City of Norfolk as the operators of a public terminal facility, and made the usual wharfage and handling allowance to them where rates had shipside application, the Army did not receive or benefit from this allowance. The Army received, as consideration for the lease of its property, a percentage of the charges on all traffic handled by the City over the leased facilities, including commercial traffic as well as Army traffic, and including all traffic handled, whether on shipside rates involving an allowance from the railroads to the City, or whether on non-shipside rates involving no allowance, but where the consignee, including the Army as consignee, paid its own wharfage and handling.

480 On December 13, 1920, the Interstate Commerce Commission rendered its decision in I&S Docket No. 1230—Wharfage, Handling and Storage Charges at Municipal Terminal, Norfolk, Virginia, in which it found that respondent—City of Norfolk, Virginia, is not a common carrier subject to the Interstate Commerce Act and, therefore, ordered the suspended schedules (Agent A. G. King's I.C.C. No. 1) stricken from their files. The Commission held "if the line-haul carriers or the Belt Line desire to use the facilities of respondent in Interstate or foreign commerce, its storage or other terminal charges should be published by them as provided in Section 6 of the Interstate Commerce Act, and should properly be established in the manner originally suggested by respondent".

Under this decision, as applied to the present Army Base terminal, privately operated and handling only its own traffic, the line-haul railroads could not incorporate this private facility into and make it a part of their interstate common carrier operation; first, because it is a private facility and would not be in position to handle any of the public's traffic that publication of charges over the facility by the line-haul carrier would require, and second, because the Army operates a private railroad intervening between the common carrier railroads and the terminal facility, and the railroads cannot incorporate, through the publication of tariff charges, a terminal facility into their interstate common carrier operation that cannot be reached except over a privately operated railroad.

The September 21, 1920 contract with the City of Norfolk remained in effect until the terminal was taken over by the Norfolk Tidewater Terminal.

On or about September 1, 1925, the Norfolk Tidewater Terminal took over the operation of the Army Supply Base and leased the terminal from the U. S. Shipping Board, at the same time making a contract agreement with the City of Norfolk to operate the facilities. Norfolk Tidewater Terminals, Inc., then approached the rail carriers for the execution of a contract to make them agents of the rail lines. However, such an agreement was not executed until June 7, 1927, when a joint agreement was made between Norfolk Tidewater Terminals, Inc., and the ACL, Norfolk Southern, SAL and Southern Railway. Later on this contract was cancelled and a new contract executed and made effective March 1, 1937. This contract provides in part "that the provision in regard to absorbing the charges shall not apply to traffic that is the property of the terminal". This contract remained in effect until a new agreement was made with the Transport, Trading & Terminal Corporation, who took over the Army Supply Base operations as of midnight June 30, 1940, after leasing same from the U. S. Maritime Commission. Article 2 of this agreement made effective July 1, 1940, provided "that the provision in regard to absorbing the charges shall not apply to traffic that is the property of the Terminal".

481 On June 15, 1942, the U. S. Government cancelled the contract between it and Transport, Trading & Terminal Corporation (see War Department letter of December 1, attached) and took over the use and operation of the Army Base. The War Department letter of December 1, 1942, from which this information is taken, names both Piers 1 and 2 and does not mention the Navy Department as having taken over and any portion of the Base but it is a fact that when the Transport, Trading & Terminal Corporation moved out, the Navy moved into and has since continued to occupy and operate the north half of the Base, including Pier 2, Warehouses 6, 7 and 8, and a substantial part of the ground area. A fence some eight feet high was built separating this part from the remainder occupied by the Army.

The Transport, Trading & Terminal Corporation continued to function at the Base for about thirty days, disposing of commercial freight on hand at the time the Government took over.

There is attached letter dated December 1, 1942 from the War Department to Mr. A. F. Cleveland, Vice President, Association of American Railroads, advising that the War Department is now operating Army Base Piers 1 and 2, not mentioning the Navy Department, "for its own exclusive use" and asking the railroads to make the same allowance to it for handling Government traffic over the pier as they formerly made to the Transport, Trading & Terminal Corporation for handling commercial traffic for the public over the piers. Particular attention is directed to the War Department statement that the War Department is operating the terminal "for its own exclusive use" meaning it will not accept or handle commercial traffic for the public. Attention is also directed to the fact that the railroads did not make any allowance to the Transport, Trading & Terminal Corporation for handling its own traffic, so the failure to make an allowance to the War Department was consistent with the prior arrangement with that Terminal Company.

Mr. A. F. Cleveland, in his reply of February 16, 1943, advised the War Department that it would not be proper to make the allowance, this terminal no longer being a public terminal but the private facility of a private shipper, no different from the private facility of many other industries, and of the Navy Department.

The next communication from the War Department is a letter from Brigadier General Kilpatrick dated May 22, 1943, to the General Freight Agents of the line-haul carriers serving Norfolk. Copy of this letter is attached. This letter requested the railroads to "meet their legal obligation by performing unloading service, when line-haul rates cover such service". Aside from the fact that the line-haul railroads recognize no obligation to perform the unloading service on a shipper's own traffic handled
482 over his private dock, the letter does not undertake to explain how the railroads could hold themselves in readiness to meet the alleged obligation when the freight is taken out of their possession and they are not permitted to know what particular carloads of traffic are to be exported rather than stored on premises, used locally, or forwarded as "overseas freight" instead of export freight. Also assuming certain carloads are earmarked for actual export, which earmarkings the railroads could not know about, whether the regular business hours during which the railroad would be prepared to perform the unloading would be acceptable to the Army.

The railroads replied individually to this letter, each advising that it has no obligation to do this unloading. Copies of these letters are attached.

The final letter from the War Department was Brigadier General Kilpatrick's letter of May 1, 1943, copy attached, addressed to General Freight Agent Randolph B. Cooke of the Pennsylvania Railroad at Norfolk. Copy of that letter is attached. It requests the Pennsylvania Railroad to perform the terminal service on a specific car.

483

DEFENDANTS' EXHIBIT NO. 28
I.C.C. DOCKET NO. 29117
WITNESS: W. W. WOLFORD

ARRANGEMENTS BETWEEN THE SOUTHERN TERRITORY LINES AND PUBLIC RAIL-WATER TERMINALS IN THE HAMPTON ROADS AREA, AND PRACTICES OF THE SOUTHERN TERRITORY LINES IN REGARD TO ALL PRIVATE INDUSTRIES HAVING WATERFRONT TERMINALS ENGAGED IN HANDLING THEIR OWN TRAFFIC

Paragraph 11 of the complaint alleges discrimination in the treatment accorded other docks at Norfolk as contrasted with treatment accorded complainant. The following describes the arrangements with all terminals in the area.

LAMBERTS POINT DOCKS, INC.

This terminal is engaged *solely* in handling *commercial traffic for the public* interchanged between rail and water carriers, it is served by the N&W Railway and is located near N&W terminals at the spot marked Lamberts Point on the map, Exhibit No. 23. The railroads have a standard contract with it covering its relations with them in the performance of the terminal services. The railroad's tracks serve the terminal directly, rather than through an intervening private railroad facility. Although this public terminal does not have any traffic of its own, if it should have, it would not receive any allowance for unloading and wharfage even though such traffic moved on export rates with shipside application. The standard contract the railroads have with it so provides.

NORFOLK TIDEWATER TERMINAL

This company operated the Army Base Terminals from Sept. 1 1925, to June 30, 1940. After vacating those terminals, it soon thereafter leased Southern Railway Pier No. 4, and later also leased Seaboard Railway Pier No. 7.

both on the west side of the Elizabeth River. This terminal is engaged in handling *commercial traffic for the public*, and has not handled any of its own traffic. If it did handle any of its own traffic, the railroads would not make any allowance to it on that traffic. The Southern Railway has a standard contract with it covering its relations with them in the performance of the terminal services. This contract contains the usual standard provision that no allowance will be made to the terminal on its own traffic. The Seaboard contract with the terminal is still in process of negotiation covering some details.

484

LINCOLN TIDEWATER TERMINALS, INC.
(for commercial traffic)
also known as
ARMY AIR FORCE—IN TRANSIT—DEPOT NO. 12
(for Army Air Force traffic)
also known as
UNITED NATIONS DEPOT NO. 9
(for lend-lease traffic which formerly moved)
also
HRPE—LINCOLN TIDEWATER TERMINALS—SEWALLS POINT
(for HRPE traffic)

The Lincoln Tidewater Terminals succeeded the Lamberts Point Docks—Sewalls Point Division.

The U. S. Air Corps took over the Sewalls Point, Va. terminals of the N&W Railway under lease on March 16, 1942, designating these piers as "U. S. Air Corps Defense Aid Depot No. 9," later known as "United Nations Depot No. 9" and presently known as "Army Air Force—In Transit—Depot No. 12". On or about the same time the U. S. Air Corps contracted with the Lincoln Tidewater Terminals to act as ocean terminal operators at this terminal for them. In addition to the U. S. Air Corps' own traffic consisting of airplanes, airplane engines, propellers and parts consigned to off-shore bases, the Air Corps also permitted export lend-lease materials to pass over this pier. The name of the pier for purpose of handling this lend-lease traffic over it was "United Nations Depot No. 9". The name of the lend-lease agency or organization handling this lend-lease material is not known.

In January, 1944, the organization handling the lend-lease materials became "deactivated".

Recently, whether before or after January, 1944, not being known, the army organization known as Hampton Roads Port of Embarkation (HRPE), which is the organization operating Army Base Pier 1, also began to move traffic (perhaps but not necessarily overflow from Army Base Pier 1) over this pier. They (HRPE) did not displace the Army Air Force but both thereafter used these piers jointly. HRPE also used the stevedoring and related services of the Lincoln Tidewater Terminals organization, possibly having entered into the same arrangements with the terminal organization as already existed and exist between the terminal organization and the Army Air Force. HRPE also (the same as at Army Base Pier 1) uses its own enlisted labor battalions and hires civilian laborers individually, as well as contracts with the stevedores, the latter to furnish their own laborers.

485 The Norfolk & Portsmouth Belt Line Railroad, the switching carrier for the line-haul railroads, names the Lincoln Tidewater Terminals, Inc., as one of the terminals to whom the allowance will be made on traffic moving on rates subject to shipside application. On March 18, 1942 the Lincoln Tidewater Terminals advised the Norfolk rail carriers that they had taken over operation of the Lamberts Point Docks, under contract with the U. S. Air Corps, and requested the immediate amendment in all switching and terminal absorption tariffs covering this property, listing same in the name of Lincoln Tidewater Terminals, Inc. On the assumption the Lincoln Tidewater Terminals were taking over the former public terminal operation of their predecessors as well as engaging in the handling of certain Government traffic and with a verbal agreement that the new terminal operators would execute a standard operating agreement the same as then in force with the Lamberts Point Docks, Inc., making them agents of the line-haul carriers, the railroads granted their request and effective on April 10, 1942 changed their tariffs substituting the name of the Lincoln Tidewater Terminals, Inc., for the Lamberts Point Docks, Inc. Sewalls Point Division). This tariff change was accomplished in Supplement No. 22 to N.&P.B.L. R.R. I.C.C. No. 105. Shortly thereafter a standard operating agreement was drafted and presented to the Lincoln Tidewater Terminals for execution, but was returned by them in May 1942 with the statement that under their contract with the Government to operate the terminals on a flat fee basis (the Government paying all wages and cost of op-

erations, with the exception of the office force, stationery and office supplies) they could not furnish insurance or performance bond at the expense of the Lincoln Tidewater Terminals. In the light of these subsequent developments that the Lincoln Tidewater Terminals are merely an agent for the Government, handling only the Government's traffic, and would not be operating as a public terminal nor be handling commercial traffic except to an inconsequential degree if at all, the matter of executing an operation agreement with them making the terminal an agent of the rail carriers for such commercial traffic as they might handle was dropped.

The only known instance of commercial traffic for the public moving over the docks on a rate subject to shipside application and handled by the Lincoln Tidewater Terminals was some ore imported over the docks destined to Emco, Ala. handled by the railroads on a commercial (non-government) bill of lading as a commercial shipment to a non-government consignee. The railroad made the allowance on that. On all Government traffic handled by the Army Air Force and by HRPE over this dock, no allowance has been made. Neither one is seeking an allowance in this complaint.

486 IMPERIAL TOBACCO COMPANY DOCKS

The Imperial Tobacco Company is located on the waterfront at Berkeley.

It has deepwater docks and as a part of its business it brings in by rail and exports its own tobacco over these dock facilities. It also handles tobacco and tobacco accessories for others over these docks.

As a public dock handling commercial traffic for others the railroads treat it the same as other public terminals. They have entered into a contract with it and make it the allowance on traffic moving on rates subject to shipside application.

As a private dock handling its own traffic, the railroads treat it the same as they do the Army Base, the Naval Base, the Army Air Force Lincoln Tidewater Terminal and the numerous other private industries handling their own traffic over their own docks—*i. e.* the railroads make no allowance on such traffic.

NAVAL OPERATING BASE

The Navy Department is engaged in handling Navy traffic through this terminal in the same way that HRPE is en-

gaged in handling Army traffic through the Army Base. No allowance has been sought and none is made.

PRIVATE INDUSTRIES IN NORFOLK-PORTSMOUTH AREA HAVING DEEPWATER FACILITIES AND RAIL CONNECTIONS

American Oil Company (Mexican Petroleum Corp.)
Armour Fertilizer Works
Co-operative Fertilizer Service
Chilean Nitrate Sales Corporation
Gulf Refining Company
Imperial Tobacco Company
Jones Cold Storage Company
Lone Star Cement Corporation
Pure Oil Company
Robertson Chemical Corporation
Royster, F. S., Company
Smith-Douglass Company
Standard Oil Company
Swift & Company (Fertilizers)
Texas Company
Virginia-Carolina Chemical Corporation
Weaver Fertilizer Company

These private industries are all engaged in handling their own traffic over their own docks in the same manner that the Army's traffic is moving over its Army Base pier. No allowance is made to any of them.

487

I.C.C. DOCKET NO. 29117
DEFENDANTS' EXHIBIT NO. 33
WITNESS: THEOBALD

THIS AGREEMENT, made this 31st day of October, 1931, by and between THE IMPERIAL TOBACCO COMPANY (of Great Britain and Ireland), LIMITED, a corporation organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, and duly qualified to transact business in the State of Virginia, hereinafter referred to as the Imperial Company, party of the first part; and

ATLANTIC COAST LINE RAILROAD COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Virginia, hereinafter referred to as the Carrier, party of the second part:

WITNESSETH THAT

WHEREAS, the Imperial Company is operating piers and warehouses located on the Elizabeth River at Berkley (Norfolk), Virginia; and

WHEREAS, the parties to this agreement desire to cooperate with each other in order that the aforesaid facilities of the Imperial Company may be made available to the fullest extent for the development of waterborne traffic, may contribute to the upbuilding of the business of the respective companies parties to this agreement and to the business of the Port of Norfok; and

WHEREAS, to this end the parties hereto desire to enter into an agreement with respect to the handling and storing of merchandise of all kinds at the said piers and warehouses of the Imperial Company when consigned to or in care of the said Imperial Company;

NOW, THEREFORE, for and in consideration of the premises and of the covenants and agreements on the part of each party hereto to be observed, kept and performed, it is hereby mutually covenanted, stipulated and agreed by and between the parties hereto as follows:

1. That as to export, import, intercoastal and coastwise freight traffic (other than traffic moving via regular coastwise lines on joint through rates), in carload lots, also in less than carload lots aggregating 10,000 pounds or more, the carrier shall and will take and deliver the same over its line at the same basis of rates as applied to and from its Norfolk station, as contained in Carrier's published tariffs, and in the same manner and with the same promptness that it delivers and receives like traffic at any other terminal point controlled by it in the City of Norfolk, provided the origin or destination and route of such traffic is such as will afford the Carrier a line-haul beyond the Norfolk switching district. Nothing in this paragraph shall be construed to require the absorption of any terminal charges contrary to the provisions of paragraph 2 hereof.

2. That on import, export, intercoastal and coastwise freight traffic (other than traffic moving via coastwise lines on joint through rates), in carload lots, also in less than carload lots aggregating 10,000 pounds or more, handled for account of the Carrier by the Imperial Company where the tariffs of the Carrier provide that wharfage and/or handling charges shall be absorbed in the freight rate to or from Norfolk, the Carrier will absorb wharfage and/or handling charges at the piers and warehouses of the Imperial Company in the same manner and to the same extent that it

absorbs such charges at its own terminals at Pinners Point; Provided, that no handling charge will be absorbed on freight in open top cars, grain in bulk or freight in tank cars; and provided that the provisions of this paragraph shall not apply to traffic that is the property of the Imperial Company.

3. That where the Carriers' tariffs do not provide that wharfage and/or handling charges shall be absorbed in the freight rate, the Carrier shall publish in its tariffs the same added wharfage and/or handling charges to apply on traffic moving over the piers and warehouses of the Imperial Company as are effective at the Carrier's own terminals at Pinners Point. Such added wharfage and/or handling charges shall accrue to the Imperial Company.

4. The Imperial Company agrees to make every reasonable effort to load and unload cars or lighters promptly and to reduce the delay to a minimum.

5. The Imperial Company shall provide the necessary organization and employes to perform the labor of loading and unloading cars or lighters and to check freight to or from its piers and warehouses.

6. The Imperial Company agrees to be responsible to the Carrier for collection of freight charges as per freight bills rendered by the Carrier and any other charges lawfully assessed against the property transported and to comply with the laws with regard to collection of such charges by common carriers and with lawful orders of Government authorities of competent jurisdiction affecting such collection by common carrier.

7. The charges collected by the Imperial Company and due to the Carrier shall be paid by the Imperial Company to the Carrier in accordance with the rules and regulations prescribed by proper officers of the Carrier.

488 8. The Imperial Company agrees to be responsible to the Carrier for any improper delivery of goods entrusted to its possession under the terms of this contract.

9. That with respect to freight delivered to the Imperial Company by the Carrier the Imperial Company shall assume the duties and obligations imposed by law and/or rules of the American Railway Association, Division VII—Freight Claims (commonly known as the Freight Claim Association) upon a delivering carrier. It is understood that delivery shall have been made when cars, car floats or lighters have had their first placement at the wharf adja-

cent to the piers and/or warehouses of the said Imperial Company.

10. That with respect to freight to be delivered to the Carrier by the Imperial Company, the Imperial Company will be responsible until such freight is in proper shipping condition and is loaded into the cars or lighters and bill of lading and shipping order come into the possession of the Carrier. That in the adjustment of claims on such freight the Imperial Company will assume the duties and obligations imposed upon a forwarding carrier by law and/or rules of the American Railway Association, Division VII—Freight Claims (commonly known as the Freight Claim Association).

11. The Imperial Company will indemnify the Carrier and save it harmless to the extent of the common carrier or warehouseman's liability of the Carrier, as the case may be, in the event of any claims for loss or damage to freight in the Imperial Company's possession as per the preceding paragraphs hereof (numbers 9 and 10), including loss or damage by fire.

12. The Imperial Company will make no charge against the owners of freight or any other persons for the storage thereof or for other services rendered by the Imperial Company in connection therewith during the period of free time established by the duly published tariffs of the Carrier for whose account the freight is handled. It is understood that such free time shall be computed in accordance with the rules of the published tariff whether the traffic is held in cars or on lighters or on the premises of the Imperial Company.

13. That with respect to import, export, intercoastal and coastwise freight handled by the Imperial Company hereunder, the Imperial Company shall make same charge for storage, use of terminals or any other services in connection therewith and under same rules and regulations as are contemporaneously maintained by the Carrier for similar services at its own piers at Pinners Point, except this is not intended to apply to freight that may be on long time storage.

14. The Imperial Company will make, execute and deliver to the Carrier, and at all times during the life of this agreement maintain in full force, a bond in such form and with such good and sufficient surety or sureties as may be approved by the Carrier, in the penal sum of Five Thousand Dollars ($5,000.00), conditioned upon the faithful performance by the Imperial Company of each and every its covenants in this agreement contained. The Imperial Com-

pany will also, at its own cost and expense provide, and at all times during the life of this agreement keep in full force, fire insurance in sufficient amount to protect the full liability of the Carrier for goods, wares and merchandise while in the possession of the Imperial Company as defined in this agreement; policies to be written by approved insurance companies with loss payable clause reading as follows:

"Loss, if any, on property belonging to The Imperial Tobacco Company (of Great Britain and Ireland), Limited, payable to them."

"Loss, if any, on property held by the assured as agent of or for account of Atlantic Coast Line Railroad Company payable to The Imperial Tobacco Company (of Great Britain and Ireland), Limited, and/or Atlantic Coast Line Railroad Company, as respective interests may appear."

15. That the Imperial Company will not perform a common carrier service or make a charge therefor until such service and charge are covered by the Carrier's tariffs lawfully effective.

16. That wherever the service performed and charge assessed by the Imperial Company under this agreement are covered or are to be covered by tariffs, classifications, rules and regulations of the Carrier, it is understood that the Imperial Company is to act as agent of the Carrier and to strictly comply with its publications and the laws and/or lawful orders of Government authorities of competent jurisdiction, and that the Imperial Company will indemnify the carrier for all damage or expense it may incur by reason of the Imperial Company's violation of this understanding.

17. The Imperial Company will keep the said warehouses and premises in good order and repair and properly equipped for the prompt and effective handling of the traffic delivered to and received from it by the Carrier.

18. It is further agreed that no assignments of this agreement shall be valid without the consent of the Carrier, and that this shall apply as well to involuntary assignments, and that upon the happening of any legal proceedings the effect of which shall be to divest the title or possession of the said Imperial Company this agreement shall, at the option of the Carrier, cease and determine.

489 19. That this agreement shall take effect as of the date of these presents, and shall continue in effect until such time as either party hereto shall terminate the

same by serving upon the other ninety (90) days' notice in writing, of the election so to do; PROVIDED, however, that the Carrier shall have the right, and the same is hereby reserved, to terminate the same forthwith upon the violation by the Imperial Company of any of its covenants in this agreement contained.

20. In case of any difference or dispute arising under this agreement with reference to its proper interpretation, the parties hereto agree to submit the same to two arbitrators, one of whom shall be appointed by the Carrier and the other by the Imperial Company, and if these arbitrators cannot agree, they shall select a third disinterested and competent party, and their decision or that of a majority of them shall be final and conclusive between the parties hereto. And, in case either of the said parties shall fail to appoint an arbitrator, as aforesaid, for the period of thirty (30) days after written notice given by the other party to make such appointment, then and in that event, the arbitrator appointed by the party not in default shall appoint an arbitrator for the defaulting party, and the said two arbitrators shall select a third arbitrator, and the three so chosen shall hear and decide such differences, and their decisions or that of a majority of them shall be final and conclusive upon the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their respective officers thereunto duly authorized, the day and year first above written.

THE IMPERIAL TOBACCO COMPANY (of Great Britain and Ireland), LIMITED,
By (S) L. H. REED,
Resident Director.

In presence of:
(S) W. A. LARK,
(S) J. M. JONES,
As to Imperial Company.

ATLANTIC COAST LINE RAILROAD COMPANY,
By: (S) C. McD. DAVIS,
Vice-President.

In presence of:
(S) J. E. LOUGHLIN,
(S) JAMES B. SHARPTON,
As to Carrier.

No. 29117

UNITED STATES OF AMERICA

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*

Submitted Decided

Refusal of defendants to make the Army an allowance for wharfage and handling costs incident to shipside receipt and delivery of its export, import, coastwise and intercoastal freight at Army Base Piers 1 and 2, Norfolk, Va., or to state wharfage and handling charges at Norfolk separate from the rates on said tariff found not to result in rates that are inapplicable, unreasonable, unjustly discriminatory, unduly prejudicial or otherwise unlawful. Complaint dismissed.

Francis M. Shea, Donald B. MacGuineas, Major Edward H. Cox, and *First Lieutenant E. F. Huber* for complainant.

Windsor F. Cousins, Anthony P. Donadio, Harold H. McLean, Charles P. Reynolds, A. J. Dixon, John C. Donnally, D. Lynch Younger, Lawrence Chaffee, R. D. Brooks, and *C. H. Ware* for defendants.

Powell G. O'Neil for State Corporation Commission of Virginia, intervener.

H. J. Wagner, Charles R. Seal, Samuel H. Williams, Frederick E. Brown, Wilbur La Roe, Jr., Arthur L. Winn, Jr., F. J. D. MacKay, H. V. C. Wade, and *Edward K. Laux* for other interveners.

REPORT PROPOSED BY WM. A. DISQUE, EXAMINER

By complaint filed April 15, 1944, complainant, hereinafter called the Army, alleges that defendants' refusal to make it an allowance for wharfage and handling costs incident to shipside receipt and delivery of its export, import, coastwise and intercoastal freight at Army Base Piers 1 and 2, Norfolk, Va., resulted and results in rates[1] that are inapplicable, unreasonable, unjustly discriminatory, unduly prejudicial and otherwise violative of the Interstate

[1] Rates and charges will be stated herein in amounts per 100 pounds.

Commerce Act. The Commission is asked to require defendants for the future to pay the Army an allowance for wharfage and handling costs or publish wharfage and handling charges separately from, and for application in connection with, rates to and from the Norfolk piers representing reductions from the present rates in the amount of such charges, and award reparation on all past shipments handled by the Army over the piers. The proceeding can concern only tariff rates. Lower rates resulting from land grant deductions and rates afforded under section 22 of the act are not within the jurisdiction of this Commission.

DOCKET NO. 29117—SHEET 2

491. The State Corporation Commission of Virginia; State Port Authority of Virginia; Norfolk Port-Traffic Commission; Richmond Chamber of Commerce; Baltimore Association of Commerce; Chamber of Commerce and Board of Trade of Philadelphia; and Port of New York Authority intervened. They oppose the publication of wharfage and handling charges separate from the rates, but otherwise are neutral.

There have long been several piers at Norfolk which have been used for export and import traffic moved to and from that port by rail. Two of them, Army Base Piers 1 and 2, jutting out into Hampton Roads just north of La-Fayette River, were built by the Army, having been completed shortly after the last war and leased to private interests for commercial peace time operation as public terminal facilities of the railroads. About two years ago, with the rapid building up of our overseas forces, the Army found it necessary to retake these two piers and operate them for the movement of tremendous and unprecedented quantities of military traffic, almost entirely outbound. Army operation began June 15, 1942, and still continues. Prior to that date the 2 piers had been operated by the Transport, Trading and Terminal Corporation as an agent or servant of defendants. Large adjacent railroad storage yards can accommodate perhaps 500 cars. They are served by the rails and power of the Norfolk and Portsmouth Belt Line Railroad Company and The Virginian Railway Company. These carriers deliver the cars containing outbound traffic and pick up the cars containing inbound traffic in the yards. The Army takes control of movements between the yards and the pier locations and there operates several locomotives of its own with its own crews. In addition the Belt Line contributes a locomotive and 2 crews, switch-

ing and reswitching cars at the direction of the Army and sometimes placing a car more than once. The loading and unloading of the cars, including the movement of the freight between the cars and the ships by lift trucks, trailer trucks and other facilities, all of which work is hereinafter called handling, is performed by the Army, generally in accordance with detailed plans and specifications prepared weeks in advance for each ship, but subject to change in emergencies. This work could not be performed by defendants according to their convenience. The freight has to be handled according to priorities and the various unusual and changing conditions that face the Army. For instance, ships that have been partially loaded or unloaded sometimes have to be temporarily moved away from the piers and out into the stream to make room for emergency loading of other ships. Some cars may be unloaded immediately upon placement, while others may be held a short time or the freight therein unloaded and stored on the piers or in warehouses before being put aboard ship. Frequently the Army has had to load ships day and night to meet a convoy deadline hour, based on calls from overseas for immediate supplies of munitions. All activities on the piers must be supervised and coordinated by one governing head. Ever since the piers were taken over by the Army it has used as its own and at its own expense the personnel of the previous pier operator, which did the handling; that is, the same men that did the work for the corporation mentioned are doing it for the Army, except that as labor shortages have developed the Army has assigned prisoners of war permanently to this work and has often used soldiers en route and sometimes stevedores to supplement regular civilian labor. At the time of the hearing the civilian personnel on the piers was only about half of the

492 total employed. There is testimony from the Army to the effect that if defendants had the manpower it would be willing to have them do the work and let them have its civilian force, subject to the screening off of the railroad employes and the observance of ordinary rules respecting such matters as security, safety, fire and cleanliness. However, the Army recognizes that the civilian force is entirely inadequate and that the railroads could not get the additional manpower needed to handle peak loads. Troops would have to be used by the Army just as they are under the present arrangement. Obviously any-

thing but Army operation is out of the question. Although the Army did not want defendants' men on the piers and knew that they could not perform the handling services according to the requirements of the situation, it nevertheless in May 1943, solely as a gesture to afford a basis for a contemplated formal complaint, made a written demand upon defendants to do this work or pay it an allowance in lieu thereof, which they refused. Incidentally, the Army allows the piers to be used for commercial bulk freight when that traffic can be handled without interfering with the movement of war traffic. Shippers make their own arrangements with the Army. About 700 carloads of commercial freight have been so handled. Among them were a number of carloads of outbound billets used as ballast and there was also some inbound ore. In at least one instance the Army unloaded the billets from the cars and put them aboard ship without charge, expecting reparation as a result of this proceeding.

By a special tariff provision defendants' export, import, coastwise and intercoastal rates to and from Norfolk are made applicable to and from the Army base piers, although the Army's traffic is not export, import, coastwise or intercoastal in the usual sense, for it passes into the possesison of the owner at the piers before being reforwarded. As applicable to and from the public commercial piers the rates of The Pennsylvania Railroad Company, the Norfolk and Western Railway Company and the Virginian, but not those of The Chesapeake and Ohio Railway Company or the southern lines,[2] generally include wharfage, that is, rent for the use of the piers, which are not owned by defendants but provided by them under contracts with the pier operators. Subject to a few exceptions, principally as to short-haul traffic, lumber, bulky articles and freight in open cars, these rates also include the handling of the freight for defendants on the public commercial piers by the pier operators, but not by the owners of the property transported. It is not the practice or legal duty of railroads to perform handling services on carload freight, except in unusual circumstances, as in the case of livestock, or freight that is to be transshipped by the railroads or their agents or servants. On traffic not here involved, where wharfage and handling are not included

[2] The rates of the southern lines generally include wharfage and handling only where the Baltimore basis applies and where competition requires it; for instance, from points in central territory.

in the rates, published charges therefor are added, viz: 1 cent for wharfage and 3 cents for handling. Defendants provide wharfage and handling on the traffic here considered because it is in their custody for further movement and the shipper is not present to take possession of it and handle it. Shippers could not handle their freight

493 without interfering with defendants' operations on the piers. The amounts paid by defendants to the operators of the piers and absorbed by defendants out of the rates are the same as the published charges. The same arrangements applied at the Army base piers when they were operated as public commercial piers and similar arrangements as to handling, but not wharfage, are in effect at the other north Atlantic ports where the services are performed on public commercial piers by the railroads or their agents or servants, not owners of the property transported, but since the Army took over the operation of its Norfolk piers, thus furnishing its own wharfage and doing its own handling, there have been no arrangements there for wharfage or handling by or for defendants. Some of the tariffs continue to refer to wharfage and handling at the piers of the Transport, Trading & Terminal Corporation at Norfolk until after the Army took over, but, of course, no such facilities or services could be provided by defendants and the uncanceled tariff provisions therefor were obviously a nullity. The main fact here is that the rates once contemplated wharfage and handling at what are now the Army base piers and still do at the public commercial piers, but defendants are relieved of furnishing wharfage and handling at the Army base piers. In other words, under the present rates as applied to the Army base piers the Army, at its own expense, provides the facilities and performs all of the handling which, by the application of the rate, it pays defendants to do, while shippers who send their traffic over the public commercial piers have facilities furnished and handling done for them without extra cost. The transportation to and from the piers is the same in both instances. The Army asks an allowance of 4 cents, the total of the wharfage and handling charges, or that the wharfage and handling charges at the Norfolk piers be published separately from the rates. As ground for its prayers it contends that the rates were and are relatively unreasonable; that it has been and is being subjected to unjust dis-

crimination; and that defendants have been and are following an unjust and unlawful practice in not providing, or paying for, the wharfage and handling. The past shipments involved moved on Government bills of lading, commercial bills of lading and commercial bills of lading converted into Government bills of lading. The Army paid the freight charges on the shipments covered by the Government bills of lading and commercial bills of lading converted into Government bills of lading.

The Army has leased a pier of the Norfolk & Western at Sewall Point, immediately north of the Army base piers and known as the United Nations Depot. It is used for Lend-Lease traffic and as an air corps "in-transit" depot. There the Army has hired the Lincoln Tidewater Terminals, Incorporated, to do the handling on a cost plus basis. Under certain contracts defendants pay this pier operator, except on Army traffic, a wharfage and handling charge of about 4 cents and the payments are turned over to the Army as the Army pays the pier operator for the facilities and the handling.

At Newport News, Va., across Hampton Roads from Norfolk, where the Army has taken over the piers of The Chesapeake and Ohio Railway Company, the Army gets an allowance of 50 cents per ton for handling and is charged nothing for the use of the piers. At Baltimore, Md.,

494 the carriers handle the Army's carload freight and pay an allowance on less than carload freight. They pay handling allowances to the Army at Philadelphia, Pa., New York, N. Y., and Boston, Mass. The allowances here mentioned are made under section 22 of the act.

Defendants' evidence is to the effect that the rates in question to and from Norfolk are under a reasonable maximum level and that a 4-cent allowance would put them that much farther below the upper limit of reasonableness. While the rates mentioned include wharfage and handling, nothing was ever consciously included in them to cover the cost of these items. Stated otherwise, defendants have never particularly considered wharfage and handling in making the rates. They have always left the matter of charging or not charging for them to the railroads directly serving the port. None of the rates involved exceed the domestic rates. Practically all of them are lower. They are generally the same as the rates to and from Baltimore,

although movement to and from Norfolk generally entails longer hauls. For instance, from 196 important points in central territory the average distances are 838 miles to Norfolk and 690 miles to Baltimore. On class-rate traffic the rates involved to and from Norfolk are over 9 percent lower than the corresponding prescribed domestic rates.

The Army cites *Wight* v. *United States*, 167 U. S. 512, wherein unjust discrimination was found to exist because one shipper got a lower rate than another for the same transportation, although from the standpoint of competition there were good business reasons for the difference. It further cites *Borden's Farm Products Co.* v. *New York, N. H. & H. R. Co.*, 92 I. C. C. 270; 102 I. C. C. 497; and 147 I. C. C. 493, where the shipper of some perishable freight did necessary icing because the carriers, having no icing facilities, had failed to do it, although the rates included it; the Commission found that the carriers had followed an unreasonable and unlawful practice and that the shipper was accordingly entitled to reparation representing the reasonable cost of the icing. Also cited by the Army are: *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *Union Pac. R. Co.* v. *Updike Grain Co.*, 222 U. S. 215; *United States* v. *Baltimore & O. R. Co.*, 231 U. S. 274; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422; *Colorado & Utah Coal Co.* v. *Denver & S. L. R. Co.*, 85 I. C. C. 545; *S. S. Pierce Co.* v. *Boston & A. R.*, 186 I. C. C. 583; *Elimination of New York, N. H. & H. R. Pier Stations*, 255 I. C. C. 305. None of the decisions affords the Army any support, as is evident from an examination of the facts and issues.

It is not the fault of defendants that the Army does not get as much service at Norfolk as other shippers. There is no indication that defendants have fallen short of their duty to provide all reasonable pier facilities, even assuming that they were legally bound to do so, which they deny, citing section 6(11) of the act and *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663; 694. Special facilities for war are for the nation to provide. The proceeding did not arise out of any foreseeable circumstances for which defendants are responsible, but grew out of the unusual necessities of an emergency. The Army has not been hired by defendants to provide wharves or perform the handling service. It can not require them to hire

it. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199; 214. The volunteer gets no pay. The Army could have had the traffic wharved and handled at defendants' expense if it had used defendants' piers and been willing to accept transportation such as defendants would have been able to provide. Railroads have the right to limit their terminal services to particular piers, if there is no unjust discrimination or undue prejudice. *McCormick Warehouse Co.* v. *Pennsylvania R. Co.*, 191 I. C. C. 727. They can not be required to operate on private property. *Winnsboro Granite Corp.* v. *Southern Ry. Co.*, 176 I. C. C. 481. The wharfage and handling at defendants' public commercial piers are plainly transportation provided by defendants for the shipper. Providing a wharf and handling the freight at the Army piers are plainly not transportation, but merely facilities provided and work done by a shipper for himself on his own property at his own convenience before and after the transportation is performed. Defendants therefore may not be required to provide a wharf or handle the freight on the Army piers and not being required to do so, are not bound to pay an allowance in lieu thereof. *Propriety of Operating Practices-Terminal Services*, 209 I. C. C. 11; 20; and *Ford Motor Co. Terminal Allowance*, 209 I. C. C. 77. The facts in the instant proceeding are very similar to those in *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463. There the refusal of the railroads to handle freight between cars and ships at Port Newark, N. J. on the shipper's own pier, while they performed such service on nearby public commercial piers on the same kind of traffic moving at the same rates, was found not unreasonable, unjustly discriminatory or unduly prejudicial. See also *Norfolk Port Comm.* v. *Chesapeake & O. Ry. Co.*, 159 I. C. C. 169, in principle to substantially the same effect.

The foregoing discussion disposes of the form of relief first stated and leaves for consideration the alternative question of whether 4 cents should be deducted from the rates involved to represent the wharfage and handling costs and published as separate charges with the rates reduced accordingly. Under such an arrangement the commercial shipper would pay the reduced rates plus the separate charges. So far as the total amounts paid by him are concerned, the situation would not be changed. The Army, however, would pay the reduced rates without the separate charges and the effect would be the same as an allowance

The Commission can require rates and charges to be published in this manner where the facts warrant. Section 6(1) of the act provides in part as follows:

> The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the pasesnger, shipper, or consignee.

DOCKET NO. 29117—Sheet 7

496 In *Iron Ore Rates Cases*, 41 I. C. C. 181; 203, and 44 I. C. C. 368; 371, the Commission dealt with rates on ex-lake iron ore from the lower Lake Erie ports, and after considering the intent of the above-quoted provision and taking into account the practical considerations involved, required the carriers to state separately from these rates the charges for terminal services performed by them at the lake docks. In *Maritime Assn. Boston Chamber of Commerce v. Ann Arbor R. Co.*, 126 I. C. C. 199, it considered the rates on ex-lake grain and grain products from Buffalo, N. Y. to New York and Boston for ex-port and said, in passing, at page 213:

> It is quite impossible upon this record to compare with any accuracy the terminal services performed at the ports upon this ex-lake grain after the cars are spotted at the water-front elevator, of the respective costs and special charges for such services. In our opinion, however, the evidence upon this subject indicates the desirability of confining the line-haul rates strictly to the service ending with the spotting of the cars, and requiring all further terminal service to be covered by a special charge or charges. Such a plan would preserve to each port such advantages as inhere in facilities for the convenient and economical loading of vessels, and would also facilitate such comparison of special terminal services and charges therefor as may be deemed advisable in the future. The situation is not unlike that presented in *Iron Ore Rate Cases*, 41

I. C. C. 181, where a similar separation of charges was required for sawn[illegible] in analogous reasons.

In *Carolina Shippers' Assn. v. Atlantic Coast Line R. Co.*, 177 I. C. C. 161, in dealing with ex-ship rates of bananas from Charleston, S. C., the Commission incidentally expressed the view that separation of wharfage and handling charges from rates was preferable to the publication of rates from shipside. However, in *Lighterage Cases*, 203 I. C. C. 481; and *State of New Jersey v. Baltimore & O. R. Co.*, 245 I.C.C. 581, it refused to require terminal charges at Baltimore and New York to be separated from the rates. In *Wharfage Charges at Atlantic and Gulf Ports*, *supra*, 678, 692; after extensive investigation and consideration of various facts and contentions, it refused to require port terminal charges at Norfolk and the other ports there involved to be separated from the rates, notwithstanding the opposition of the United States Shipping Board and almost all of the port interests, except those of New York. The north Atlantic port interests interveners herein now reverse the position they there took, and with the New York interests and defendants, urge that the decision last cited was sound and should be followed here. They fear that if wharfage and handling charges at Norfolk are published separately from the rates, the same thing will happen elsewhere along the Atlantic coast and disrupt long-standing rate relations among the various competing ports and change the flow of traffic to the detriment of one or the other. In other words, they are interested in continuing single-factor rates to each port which include all services, to preserve the port differential relationships. They have the right view.

497 Questions may arise as to whether rates not including wharfage and handling should be prescribed for application solely to and from the Army piers 4 cents lower than the rates that include wharfage and handling that apply to the other Norfolk piers. It is sufficient to say that there is no showing that such rates would be reasonable maxima.

Under section 22 of the act defendants could either make the Army an allowance or accord it rates to and from its piers lower than those to and from the other Norfolk piers. It is not clear how they would thus bring on valid claims from private shippers for like treatment, as they contend they would, for allowances to private shippers for services

that are not transportation can not lawfully be demanded or made. *Propriety of Operating Practices—Terminal Services, supra*, 29, 30, and *Merchants Warehouse Co. v. United States*, 283 U. S. 501; and special concessions accorded the Government are no basis for reasonable rates for shippers in general. Defendants' refusal has the sanction of law and there are no good grounds for affirmative action by this Commission.

The Commission should find that defendants' refusal to make the Army an allowance of to stage wharfage and handling charges at Norfolk separately from their rates does not result in rates that are inapplicable, unreasonable, unjustly discriminatory or unduly prejudicial.

The complaint should be dismissed.

499 Before the Interstate Commerce Commission

Docket No. 29117

UNITED STATES OF AMERICA

vs.

ABERDEEN AND ROCKFISH, ET AL.

Reporter's Transcript of Oral Argument

Hearing Room "B", I. C. C. Building, Washington, D. C.

Thursday, April 5, 1945

The above entitled matter came on for oral argument before the Commission (Division No. 2) at 10 o'clock a. m.

Present: Commrs. Rogers, (Presiding) Splawn and Barnard.

APPEARANCES

Donald B. MacGuineas, Room 3640, Department of Justice, Washington, D. C., appearing for Complainant.

Edward M. Cox, Major, J. A. G. D., Room 3723 Munitions Building, Washington 25, D. C., appearing for Secretary of War.

Windsor F. Cousins, 1740 Broad Street Station Bldg., Philadelphia 4, Pennsylvania, appearing for Defendants.

Charles P. Reynolds, 1110 Shoreham Building, Washington, D. C., appearing for Southern Carriers, Defendants.

Arthur L. Winn, Jr., Investment Building, Washington, D. C., appearing for Baltimore Asso. of Commerce, Chamber of Commerce and Board of Trade of Philadelphia, Norfolk Port-Traffic Commission, Port of New York Authority, Richmond Chamber of Commerce, and State Port Authority of Virginia.

501. *Proceedings*

Chairman Rogers. Division 2 will hear argument now in 29117, United States versus Aberdeen and Rockfish Railroad Company.

Mr. MacGuineas?

Argument of Donald B. MacGuineas

Mr. MacGuineas. May it please the Commission, this proceeding has been instituted by the United States to redress what we consider unjust and unfair practices and unjust discrimination by the carriers who serve the Port of Norfolk, Virginia in connection with the handling of traffic of the War Department which moves over what are termed the Army base piers at Norfolk.

The carriers, in their briefs, would make out that we are really complaining merely of an unreasonable rate as such, that however we quite misconceive the copy of our complaint as will be more apparent later.

The Army base piers at Norfolk consist of two, 1200 feet long, modern concrete covered piers, with all mechanical facilities for loading and unloading modern ocean-going cargo vessels. They have a capacity capable of loading and unloading eight large cargo ships simultaneously. They were constructed by the Government at the close of the first World War, and they began operation in 1920.

502 Beginning in 1920, and ever since, those piers have been a major facility at the Port of Norfolk for handling export and import traffic. The piers themselves, although owned by the Government, have always since 1920, been operated by so-called terminal operators. The railroads reach those piers over the lines of the Virginian and also over the lines of the Norfolk and Portsmouth Belt line which has connections with all of the other line haul carriers reaching that facility.

As I say, for a period ever since 1920, the carriers have used that facility as a major means of egress and ingress of traffic through the Port of Norfolk through the medium of these terminal operators, and the carriers, largely through the Belt line, have consistently brought their cars on to the piers and then the labor staff of the terminal operator would unload the cars from car to pier floor within a reasonable reach of the ship's berth.

That practice has been done pursuant to tariffs of the carriers which we contend in effect publish the shipside rates in the sense that by the tariff the carrier obligates it-

self to move the cars to the pier and to unload to Pier floor
4 within distance of the ship's tackle.

In general those tariffs fall into two classifications. A statement
lesser number contain a direct shipment that the rate on a particular commodity shall be applicable to shipside. The more frequent practice, and the practice of the trunk-line carriers, I believe without exception, is to publish a
503 separate line-haul tariff and then by an omnibus clause in that tariff to incorporate by reference a terminal tariff for the Port of Norfolk and the carriers' terminal tariff provides that it will absorb in the line-haul rate charges for wharfage and handling, and those charges are fixed generally as 1 cent per 100 pounds for wharfage, and 3 cents per 100 pounds for handling.

There are certain exceptions to the applicability of these tariffs. For example the Southern line tariffs do not generally contain shipside rates, rather it is by reference to specific commodities, and from a large number of points to or from southern territory and Norfolk a shipside rate is not applicable. Shipside rates are also provided inapplicable with respect to traffic moving in open-top cars, traffic moving in tank cars, and certain particularly heavy commodities such as lumber, but let me make it plain that we are complaining not at all with respect to any exceptions as to shipside rates which may be contained in the tariff. We accept those tariffs as they exist today.

It is our position that the carriers, however, are not living up to their obligation under the circumstances to which I now come.

As of July 15, 1942, the War Department established a so-called port of embarkation at Hampton Roads. It took possession from the terminal operator which was
504 then the Transport Trading and Terminal Corporation,—it took possession of the Army base piers 1 and 2, together with a considerable number of other facilities at the Port of Hampton Roads. The exigencies of the war necessitated that. Of course all export traffic—that is to say, the movement of traffic by ship in furtherance of the war—had to be handled under the most rigid governmental controls for safety factors. The ships move out in convoy so that of course the Government had to schedule the loading and the movement of those ships.

Upon taking over the Army base piers, the Army took over bodily the entire staff of the Transport Trading and Terminal Corporation, with the exception of the sales force, but the labor force, the men who for more than twenty years, had been unloading these cars as employees of the Transport Trading and Terminal Corporation, to the pier floor, continued to do the same work subject, of course, to normal turn-over of labor.

The actual handling of the traffic from car door to pier floor is just the same under Army operation as it had been for the last twenty years. The tariffs remain the same.

Immediately upon the taking over of these piers, however, the carriers continued to collect the full line-haul rate which, as I stated, absorbs wharfage and handling to a total of 80 cents a ton.

Commr. SPLAWN. May I ask right there: that 80 cents a ton is a concession of the railroads in connection with
505 the through movement of the traffic—rail and ocean —to yard. Is that calculated to cover the cost of this loading and handling or was it the result of any bargaining with any owners of piers or wharves, or was that just a concession in the rate—a voluntary—a division which was to encourage export and import traffic?

Mr. MACGINNEAS. Well, the evidence which the carriers introduced in this case was to the effect that the line-haul rates which were established to Norfolk and the other North Atlantic coast ports, were fixed without specifically taking into account the cost of the wharfage and handling, which was absorbed in the rate.

The Commission will recall that in 1931, in general the line-haul rates to these North Atlantic coast ports, were established to maintain certain differentials between the ports. The base rate was the line-haul rate to Baltimore. Norfolk was established at the same level as Baltimore. Philadelphia was established one cent higher than Baltimore; New York, 3 cents higher than Baltimore.

So that I think it may be said that the basic considerations in the fixing of these rates, was the determination to maintain these so-called port differentials. Nevertheless, at these other ports, as well as at Norfolk, with certain minor variations, in general the carriers do, on export traffic, absorb handling at least, if not wharfage, so that as
we see it, the handling factor at the terminal exists,
506 it is a part, a comparable part of each line-haul rate at the other ports as well as at Norfolk.

Commr. SPLAWN. That is the issue here, whether it is or not, isn't it?

Mr. MACGUINEAS. That is an issue, certainly; yes. Now at the outset, let me make it clear that we recognize the option which is established by the Atchison case in 232 U. S., an option in the carriers to themselves perform the tariff obligation, if they see fit to do so, or to have it performed on their behalf, either as by a terminal operator, which they hire, or by the shipper, and to pay—and if the shipper does it, to pay the shipper an allowance, the maximum of which does not exceed a reasonable amount for performing that work.

The Examiner's report takes the position—and we think it colors the entire report of the Examiner—that in effect we do not admit this option in the carriers. I can only emphasize here that we do. We give freely to the carriers the choice of either performing this handling themselves at the piers or perform it by way of an allowance to the shipper, that is to say, the War Department.

Commr. SPLAWN. You don't mean that the War Department would permit the railroads to take charge of those piers down there and the responsibility of the loading and unloading of this traffic, do you?

Mr. MACGUINEAS. It depends on what you mean by taking charge of the piers. The War Department, of
507 course, must continue to be in control of the entire pier as such, because necessarily it must control safety factors, and it must control ship movement. We do, however, believe, and the Commanding Officer directly testified in this case—

Commr. SPLAWN. That is due to the emergency situation and the exigencies and the necessities, and not due to any arbitrary action. It just has to be that way, isn't that right?

Mr. MACGUINEAS. Yes. Insofar as the Army must assume the overall responsibility for the safety of operations on the pier, protection against sabotage, and the schedule of shiploading, that, of course, must be done by the Army. However, as I was about to say, the Commanding General is willing, and we are willing, if the carriers honestly prefer that choice, themselves, to bring their own labor force onto those piers and do this unloading.

Commr. BARNARD. At the direction of the Army? Do you think that is part of transportation?

Mr. MACGUINEAS. Yes, we consider that this is part of transportation, this unloading service on export traffic has

been established at these North Atlantic coast ports for over fifty years.

Commr. BARNARD. I know that, but then the trouble about that is you have taken these piers over, yourself, and you propose that this wharfage shall be handled according to the way the Army wants it handled. You don't want these railroads to do it. You want to continue to exert jurisdiction over that handling yourself, the Army does?

508

Mr. MACGUINEAS. I think it is perfectly proper to say that we are just as willing for the carriers to do that as the carriers are willing to do it. The fact is that the carriers, themselves, never have done it at this pier. For twenty years it has been done by terminal operators. Carriers never had their own labor force, so that the choice, a legal choice which they have, is no practical choice to the carriers as far as they are concerned.

Commr. BARNARD. You want to handle it at the Army's convenience, don't you?

Mr. MACGUINEAS. No. In this sense—

Commr. BARNARD. Do you want it handled at the carriers' convenience?

Mr. MACGUINEAS. We think that the carriers can have a reasonable opportunity to move the cars into the piers and unload them as reasonably as is consistent with the movement of export traffic. We think that inevitably in war time or in peace time, when you are dealing with a facility which is designed to link up rail traffic with water traffic, you must have, and you will have, coordination between movement of rail car and loading of ship. Of course, you will have that coordination. But we feel that the carriers can be given the opportunity to do that at their reasonable convenience, if they actually prefer to do that themselves, although I think I may be justified in casting doubt upon the carriers' desire to do it, seeing that they never have done it at this pier in all the twenty years or more that they were perfectly free to do it.

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Commr. BARNARD. Well, as Brother Splawn says, because of the unusual situation and the exigencies that are now present due to the war, as I get the record, the Army insists that the method of handling should be all the way at those piers within its control, and done according to its ideas of the movement, isn't that right?

Mr. MACGUINEAS. Well, no. I think the carriers' position in their brief and exceptions

Commr. BARNARD. I am not asking about the carriers. I am asking about your position.

Mr. MACGUINEAS. Well, my position, and I reiterate it, is: there is an Army yardmaster at the Army base, of course, and the cars are brought into the piers in coordination with ship movement, and they always have been, and we think the convenience of the carriers is after all a reasonable concept as we see it, and under these circumstances we do not feel that the carriers are deprived of a reasonable convenience in performing this handling, if they chose to do it themselves.

Now, the basic argument of the carriers—

Commr. BARNARD. Let me just ask you one more
510 question and then maybe I will get this clear: is the Army willing, without its own supervision, to permit the carrier to handle that wharfage in its own way without interference by the Army?

Mr. MACGUINEAS. You mean, could the carriers bring in cars and let them sit there a week and not unload them if they saw fit?

Commr. BARNARD. Read him the question.

(Pending question read.)

Mr. MACGUINEAS. Yes. If the carriers will maintain a reasonable degree of coordination such as we think is no more than to be expected when you are dealing with a facility of this sort, we feel that the carriers can, and the Army is willing to permit them to do that. By that, of course, I do not mean that the Army is going to abandon the piers. Of course it will not, nor do we deem that necessary in order to afford the carriers—

Commr. BARNARD. It is a question here of who is going to exercise this authority. If you are going to say that out of this line-haul rate that this carrier should take care of this wharfage, then shouldn't you say, to be reasonable and fair about it, that they should have the right to do it in their own way without your interference or at least that they shouldn't have to be under your orders in the way it is done?

Mr. MACGUINEAS. Insofar as the handling is concerned,
we say they can do it without any unreasonable in-
511 terference on the Army's part. In other words, the Army is perfectly willing to put itself in the same position that Transport Trading and Terminal Corporation was in with respect to the carriers before the Army took over?

Commr. SPLAWN. May I ask who paid the Transport Trading and Terminal Corporation for its services?

Mr. MACGUINEAS. The carriers.

Commr. SPLAWN. I mean the total amount that they received.

Mr. MACGUINEAS. As far as this record discloses, this source of income consisted of payments for wharfage and handling paid by the carriers, and absorbed by the carriers in the line-haul rates.

Now, the basic defense to the carriers in this suit, as we see it, is that the Army, when it took over the Army base piers, placed them in a position of a private shipper, who has a facility of his own, and purely for his own convenience says to a carrier, "I want you to deliver my export traffic over my pier. I don't want to use your railroad pier."

Now we think that concept is entirely inapplicable to the situation here. In the first place, the Army is operating this pier as a sovereign, for the benefit of the public. It certainly is not seeking any private advantage as a shipper. This Commission has recognized that when the ordinary private shipper, a lumbering mill or what not, seeks to use its own pier when other railroad piers are available,
512 it does that because it is going to get some competitive advantage, some cheaper service through using its own facility and thereby obtaining an advantage over its competitors. Certainly any consideration of that sort is not present here. The Army is doing this because the exigencies of war have forced it to do it, and we think in that connection that Division 2's decision in the elimination of piers at the New York, New Haven and Hartford Railroad in 255 I.C.C. is directly applicable here. The facts there are almost identical with this case, and I hope the court will indulge me just one or two minutes if I make a few references to that report.

Commr. BARNARD. With all these Army regulations at those piers, do you think it is a practical proposition for these carriers to undertake to do this thing?

Mr. MACGUINEAS. Yes. I think that if the carriers made a bona fide earnest effort to cooperate in coordinating traffic they could do it with their own labor force.

Commr. BARNARD. They could man it altogether without any help from the Army, is that what you mean?

Mr. MACGUINEAS. The carriers can hire the laborers who do the unloading. Now that is the service that we are

talking about, and if the carriers want to hire their own labor staff they can do that and the Army will permit that labor staff on the piers, the only regulations which the Army will impose on that would be to investigate those laborers
513 to see that they are not enemy agents or anything of that sort, but the Army would not impose restrictions which would in any way unreasonably hamper the efficiency of operation in unloading by the railroads.

Commr. SPLAWN. What is this regulation that you are going to discuss—255 I.C.C.?

Mr. MACGUINEAS. That is right, and that concerns the efforts of the New York, New Haven and Hartford to eliminate certain stations on its line which consisted of export piers which the Army had taken over, just as it took over the piers at Norfolk, and it stated in that case: "Access by the general public to all of these piers is forbidden except by permission of the Commanding Officers".

Commr. BARNARD. What is the citation?

Mr. MACGUINEAS. I am reading from page 306 in 255 I.C.C.

So that there the Army did remain in control in the sense that they even could say, "No one can come on this pier without our permission"; and then on page 307 it discusses the tariff provisions which are in all material respects, in our opinion, identical with the situation here, and the carriers there made the point which the carriers have made in our case, that because commercial traffic has been very largely displaced by Army traffic at these piers, they have become private stations, and are no longer public stations, and the Commission considered those factors and said: "Fluctuations or temporary stoppages of such movement have resulted"—speaking of commercial traffic—"and probably will recur as the result of present war condi-
514 tions. We are of the opinion that the circumstances upon which it now relies as justification for continuance of that service do not warrant the conclusion that the piers in question should be treated as private piers", and certainly those considerations are applicable with equal strength to the Army base piers at Norfolk.

There is, and has been a certain movement of commercial traffic over these Army base piers. The General has testified that he will continue to permit commercial traffic to be handled over these piers subject, of course, to the paramount priority of military traffic. It should be appreciated,

of course, that the great bulk of this traffic which is moving over these piers and has been moving over them for the past two years consists of materials of war of every type—munitions, food, everything that the Army needs in Europe—

Commr. SPLAWN. And those commodities not only belong to the Government but the ships in which they carry it either belong to the Government or are chartered to the Government, isn't that true?

Mr. MACGUINEAS. I think that is a correct statement, although I think the record does not specifically disclose that, but I think the Commission could take judicial notice of that fact.

It is our position that the carriers here in collecting these line-haul rates, which are fixed to absorb wharfage and handling, and yet refusing either on the one hand to
515 perform the service or to pay an allowance to the Army as the shipper, which has been compelled to do them through default of the carriers, is guilty of unjust discrimination against the War Department, and that argument brings up a factor, another factor which appears to have been completely ignored by the Examiner in his report, and yet which seems to us very basic in consideration of this case, and that is this:

When the ordinary shipper elects to use his own pier instead of a railroad pier, as I said before, he is doing it for his own advantage. The railroad has piers there, it is offering reasonable facilities to the shippers, and I think it is a fair statement that in every case in which this Commission has sustained the carriers in refusing to extend privileges of this sort to the piers of a private shipper, it has remarked that the carriers were providing reasonable facilities of their own at the particular port.

That situation is definitely not true at Norfolk. There is testimony, undisputed by the carriers, that if the only two other piers at Norfolk which are owned by the carriers and which are operated by terminal operators, if those piers were used to full capacity, they could handle not more than 37 per cent of the traffic which is being moved over the Army base piers, and there are only at this port these two other piers owned by the carriers which are in any position to handle export movements of traffic.
516 So that the Army is no volunteer here coming in and using this pier because it is going to get some advantage, because it doesn't want the carriers to have the business of operating over their own piers. The Army

has been forced into this situation by the very inadequacy of facilities at Norfolk and the volume of traffic involved.

Not only is that true with the war, it has been true ever since 1920 when these piers were established. The carriers by their own choice have used these very piers as reasonable ones, ones most convenient for the handling of export traffic over the piers. There are a few other piers at Norfolk slips which have been permitted—the ships have been permitted so that to fill up because they can't even handle a cargo vessel. And why? Because these piers are the reasonable piers from everybody's standpoint for the handling of export traffic.

Now from all that appears from the Examiner's report, he would have the Army continue to pile up its freight at the two other piers in Norfolk knowing full well that those piers could not conceivably handle that capcity of movement. So that again we say that the situation here is entirely different from that of a private shipper who is seeking to have a privilege of this sort accorded to his own facility.

Commr. BARNARD. It is your position then, as I get it, that it is necessary to the carrier that these piers be made available to it or to them in order that they make delivery?

Mr. MACGINNEAS. I think that is so. I think course
517 of conduct at this port for twenty years, regulated by the carriers own election, establishes that. They are the ones who chose to use these piers and certainly under present conditions it is utterly impossible that these piers not be used and that the traffic be handled at all at that port.

Now, the carriers also make an issue that this case is analogous to the plant industry spotting cases. As we see it, there is no analogy at all. In the first place, we are dealing here with export traffic, traffic which moves from car to ship. The unloading from car to pier floor—

Commr. SPLAWN. May I ask a question there? Don't we usually think of export traffic as foreign trade? Now, these ships are under the American flag and is any of this going in foreign trade at all?

Mr. MACGINNEAS. Well, I take it the Commissioner appreciates that the tariffs have no limitation in the sense that you speak of it. The tariffs merely speak of traffic designed for foreign countries or words to that effect, and the carriers have never made any question as to the ap-

plicability of the export rates to this movement. They have applied, and continue to apply, the export rates.

Commr. Splawn. Is there an issue here as to whether this allowance for loading and handling is a concession for the line-haul rate in order to encourage import traffic and if that is the origin of that allowance then is this the same kind of traffic?

517A Mr. MacGuineas. My view is that this record does not support such a conclusion. I think these, what you term concessions—a word to which I object, of course—

Commr. Splawn. Well, call them whatever they are—allowances or whatever they are.

Mr. MacGuineas. As I say, historically those have developed as a part of the port equalization and port differential rate set up. Again, if I may turn my attention at the moment to the industry car spotting issue which the carriers have sought to inject in this case.

As I say, we are dealing here with traffic which is to move from rail to ship. This unloading service, to me is right in the middle of the transportation movement. It is certainly an essential process in the transportation, and furthermore, it is basically different in this respect: the industry car spotting practice, as this Commision has recognized goes, as concessions, and they are truly concessions, to big industrial plants, to large shippers. They were in a position to exert pressure on a carrier, to say, "We want you either to move your car to plant number so and so in our yard, or we want you to pay us for doing it," and great discrimination resulted, because the industries which were large enough and big enough got those allowances but the little fellows who couldn't exert pressure on the car-

518 riers did not get them, and I think, properly of course, that the attitude of the Commission toward the approval of those allowances to shippers for spotting cars in the plants, has been very largely influenced by that factor, recognizing that this was not a general practice which the carriers were opening to all shippers but as I say rebates in effect granted under pressure, but here this question of handling unloading of cars at these export terminals, is a general transportation practice. It has existed at the North Atlantic Coast ports for over fifty years. It has been available to every shipper, subject only to the qualification that in certain instances the carriers, where they had adequate facilities of their own to handle all the port traffic, have refused to extend it to, as I say, a private shipper who had some particular reason of his own for wanting to use

his own facility, but in my opinion, those considerations are not applicable here and hence there is no analogy between this situation and the industry car spotting practice.

I should like to reserve the balance of my time for rebuttal.

Chairman Rogers. Mr. Cousins?

ARGUMENT OF WINDSOR F. COUSINS

Chairman Rogers. Mr. Cousins, have you and Mr. Reynolds divided your time?

Mr. Cousins. Yes. Mr. Reynolds has kindly allowed me the greater leeway to complete my argument. I do
519 want to save him ten or fifteen minutes.

Chairman Rogers. Very well.

Mr. Cousins. As is well known, the railroads do not ordinarily undertake to load or unload carload freight; but from time immemorial there has been an exception at North Atlantic ports with respect to import and export freight.

In my discussion this morning I will use the term export freight, because this case involves that type, but practically all of what I say would be the same with respect to import or coastwise or intercoastal freight.

Subject to definite limitations, the railroads have assumed the obligation of unloading certain export freight, but by no means all export freight; even though the same export rates apply to freight excluded from the so-called port privileges or services. The distinction is important, because the issue in this case comes down to unreasonableness under Section 1, and the complaint contains no alleged violations of Section 3 for obvious reasons, since the Government doesn't compete with other shippers, although Section 3 has generally been the issue in other cases dealing with port practices.

It is therefore important to keep in mind the fact that a large volume of export freight has never been unloaded by the railroads, and consequently there is no presumption that the applicable export rates are unreasonable when the railroads refused to unload as in this case. Just as
520 the Supreme Court said in the American Sheet and Tin Plate case 301 U. S. 402, which upheld the validity of the 104 order, "There is no custom or practice which has the force of a rule of law, that the line-haul rate includes plant spotting service."

So, should it be found in this proceeding that there is no custom or practice which proves that unloading and wharfage charges on export freight are necessarily covered by the line-haul rates.

Now, some of the important limitations which exclude export freight from the unloading privilege are as follows; and when I talk about unloading privilege I am referring to the service performed by the railroads in physically unloading the cars. The railroads at North Atlantic ports do not make allowances for this type of service. Now some of these limitations are as follows:

First, much of the freight shipped in open-top cars is unloaded direct to vessels, and the railroads have no obligation with regard to that unloading, although the same export rates apply to it.

Second, the bulk freight, heavy articles—

Commr. BARNARD. What is the carrier's obligation here at this point?

Mr. COUSINS. In this case the carrier makes a delivery to establish interchange tracks in the yard on the Army base.

Commr. BARNARD. This is all carload movement, of course, isn't it?

521 Mr. COUSINS. That is all we are talking about, yes.

Back two miles or more from the piers the Army base has established interchange tracks. It directs the railroads to classify the cars in their own yards, in the railroad yards, to bring them in upon order, and to deliver them at designated places on the interchange tracks, as I say, a couple of miles from the piers. From then on the railroads have nothing to do with the cars.

Commr. BARNARD. Then isn't it a fact too in this case that the Army has its own locomotives?

Mr. COUSINS. Yes, the Army does the switching and spotting.

Commr. BARNARD. And the Army gets those cars in after they come to rest, as far as the transportation is concerned, then it takes them and with the Army, unloads them and puts them on these boats.

Mr. COUSINS. It moves them first. It has to switch them all over the yard.

Commr. BARNARD. That is right. It does that with its own motive power, doesn't it?

Mr. COUSINS. It does, except that the Belt line down there contributes one locomotive to the pool. The army has 7 or 8 crews and the Belt line provides two, and does make a concession, but it is all done by the Army and subject to its control. They switch and spot the cars to storage, to piers, or wherever they should go.

522 Commr. BARNARD. That is the way it has always been done, has it?

Mr. Cousins. That is the way it has been done since the Government took over in 1942.

Commr. Barnard. That is what I mean, since the Government took these piers over.

Mr. Cousins. Since the Government took over, the Army orders the cars delivered to designated places. I say that is when our obligation ends. We are not obliged to go in and switch the cars and place them a second time. Therefore it is wholly illogical to say that we shall skip that step, and yet come back later, after the shipper has done his own switching and spotting, and unload.

Chairman Rogers. How was it done prior to 1942?

Mr. Cousins. Prior to 1942 that pier was operated by a public wharfinger, who acted as agent for the railroad. There is nothing in the record as to the physical operation on the pier except that the railroad witness said that the Army had enlarged and extended these interchange tracks—there is nothing else except a brief statement on the part of a Government witness.

At page 121 the complainant's witness says, in response to Mr. MacGuineas' question, Mr. MacGuineas had asked him: "Can you state what the customary practice of the carrier was?" And that was before the Army time,

523 Answer: "The customary practice of the carriers was to place the cars on box car freight inside of the piers, adjacent to the berth at which the steamer would dock, and load and unload the freight from these cars and place it on the pier in what is commonly known as the ship's loading berth."

Then on cross examination the same witness made another brief statement—I am sorry I don't have the page notation—but the same witness said something more about that to the same effect.

Chairman Rogers. Did you agree with that, that that was the practice?

Mr. Cousins. I don't know. Our operating witness was not there at that time and we didn't go into that. The record does indicate that there was some power—that is, that the former pier operators had a little locomotive, and that there was some power on the terminal, and I have no doubt that there was some switching around then.

Chairman Rogers. Well, we will have to accept what the evidence shows was the practice, and if you don't agree with the Army why didn't you show what the facts were yourself.

Mr. Cousins. I don't disagree with the Army.

Chairman Rogers. Did that service back there cost the carrier some money?

Mr. Cousins. The service of unloading the cars, yes, sir.

Chairman Rogers. Are the same rates being charged now that were charged then?

524 Mr. Cousins. Yes, sir.

Chairman Rogers. What becomes of that money then that it cost the carrier back there—what becomes of it now?

Mr. Cousins. We retain it as we do in all other similar instances.

Commr. Barnard. Before the Government took over these piers, you were, according to what that witness said, you were under the line-haul rate unloading this freight?

Mr. Cousins. Yes, sir, that is correct, and we still do at various piers all along the North Atlantic ports.

Commr. Barnard. But you don't do it for the Army?

Mr. Cousins. And we don't do it for any other private shipper handling his own freight.

Now the Commission has anticipated a little. I was just coming to the limitations upon that practice, and I stated that the first one was that open cars—freight moving in open-top cars that pay the same rate doesn't get the same service—and I was about to add that bulk freight, heavy articles and tank car commodities are excluded and don't get the free unloading service. I will use the word free in a sense that will be understood.

Chairman Rogers. All commodities have their own line-haul rate, don't they?

Mr. Cousins. They are subject to the same line of

525 export rates.

Now, 3. Here is another limitation.

Commr. Barnard. Wait a minute. If on the line-haul rate, before the Government took over, the carriers were performing this service, what is your argument, what justification can you give, for changing the situation, because of the Army's coming in and taking over the piers?

Mr. Cousins. Because the next general limitation on the practice, which I am about to recite precludes this being done for the Army.

Now, here is my third limitation that has always existed with respect to this port practice: The privilege has been restricted to railroad or public piers and has never been accorded on piers owned and controlled by the owners of the freight, of which there are many up and down the coast, including some 17 at Norfolk, 20-odd at Baltimore, and more at every port as the record shows, there the railroads have

never gone in on private facilities and performed the service, and we have never made allowances to any shippers on this type of traffic.

In that I have included my fourth exception which I am about to come to, that the unloading service is actually performed by the railroads through their employees or agents and not by shippers for allowances out of the rates, as that would be an alternative which would run
526 counter to the reasons for the establishment of the practice.

Now these restrictions have been established to hold what might be called a frequent accessorial service within reasonable bounds and also because they were consistent with the reasons for the establishment of the practice, *i. e.*, to enable the railroads to operate their own piers with the greatest economy and efficiency in the aid of export traffic.

The established practices have been reviewed by the Commission in numerous cases in which the limitations that I have recited have been both approved and, on other occasions enforced by the Commission. The railroads have never been required to enlarge or expand the privileges beyond the standard limitations, and their chief concern in this case is that the complaint, if upheld, will result in the payment of allowances to a shipper and open the door to an extension of the free services to innumerable shippers with resulting waste of revenue—to use a phrase coined by the Commission.

As the law now stands, with the approval of—

Commr. SPLAWN. As you point out, there is no question of discrimination between the Army and these shippers who own their own piers.

Now, isn't the question then here as to whether or not the charges you are now electing without—including this 4 cents which the Army wants—is reasonable—a reasonable charge under all the circumstances for carrying this
527 freight for the Army. Is that the issue?

Mr. COUSINS. I think so.

Commr. SPLAWN. And that there is no question at Norfolk as to prejudice or preference or discrimination as between the Army and other shippers, there wouldn't be as between the Army and the owner of these private piers all up and down the Atlantic Seaboard?

Mr. COUSINS. That is right. There would be no question of undue prejudice.

Commr. SPLAWN. And what would be done here with reference to unjust and unreasonable charges to the Army on

this particular traffic would not necessarily be a precedent as to what you should charge these private shippers who own their own piers at Baltimore or any other part?

Mr. Cousins. Well, I don't want to get myself on the record as denying any such reasoning as that, but I am very apprehensive that that might not be the case.

Now, on June 15, 1942, the Army took over the so-called Army base at Norfolk for its own exclusive use, according to its announcement, and since that time all of the export freight moving over the facility has been Government freight with a few exceptions of small significance.

Prior to that time the terminal was operated by a public wharfinger employed by the railroads as their agent to unload commercial freight. The tariffs at Norfolk provided for the absorption of wharfage and handling costs which in a number of instances were designated as allowances, 528 although they were not allowances in the true sense, since they were not payments out of the freight rate to shippers, but rather were payments of compensation to an agent having no interest in the freight.

In my opinion there was no requirement involved that the amount of those payments be published in the tariffs at all, except to indicate to shippers that the railroads would bear no greater cost on the piers than those designated in the tariffs.

Now, since the Army took over, the tariff has contained no similar provision with respect to the Army base and the railroads have declined to assume the burden in line with established principles, *i. e.*, that they don't go on private piers to unload freight, and don't pay allowances, that the custody of the freight on the pier becomes that of the shipper—and I will cite a case in a moment in which the Commission has said that the practice can't be accorded in that instance—third, the work cannot be done at railroad convenience.

Now, I cannot take the time to go into the testimony on that point which Mr. MacGuineas has mentioned, but his own chief witness, the Commandant, General Kilpatrick, provided the evidence which shows that there is no possibility that the railroads can perform this service at their own convenience, or in any way except under the full control and direction of the Army. The General so stated again and again.

Now, Mr. MacGuineas didn't make quite clear what
529 he intended to say to the Commission when he said that in his opinion the railroads could do it. I am sure he wouldn't say that the Pennsylvania Railroad could go on the pier and unload its freight and the Norfolk and Western go on and unload its freight. He means if they get together, pool their efforts, provide something that is the equivalent of an agency and work in the only way that will meet the Army necessities, and he also comes down to the real solution as employing the Army to do it, then he means possibly it can be done, but even that is contrary to the testimony of his witness who said again and again in the record, that it can't be done by a civilian force, it has to be under Army control. It wouldn't be feasible for the railroads to act individually, they could not unload these cars at their convenience.

As to that, he said, "No, they couldn't, they would have to unload them in such a way as we would keep our ships moving."

Commr. BARNARD. They would have to unload them just the way the Army told them to unload them?

Mr. COUSINS. Certainly, sir.

Commr. BARNARD. That is what you mean?

Mr. COUSINS. Exactly. From hour to hour and from day to day.

Commr. BARNARD. And you are contending on the record that the Army is not surrendering that control over that movement?

Mr. COUSINS. That is why they took over the pier,
530 your Honor. I asked the General, I said, "You could have had everything you want from the railroads by continuing their agent in possession instead of taking the pier away from them". He said, "Civilian operation wouldn't be feasible". And it is ridiculous to assume—

Commr. BARNARD. Who was that?

Mr. COUSINS. That was the Commandant of the pier who was a witness in this case.

Commr. BARNARD. It sounds like an Army witness.

Mr. COUSINS. A very good witness too, an honest witness, and his testimony doesn't support the contentions of his counsel.

Commr. BARNARD. It didn't hurt you much, that wouldn't.

Mr. COUSINS. It made my case. Finally under the way the Army operates the piers we have made a delivery. Now, when our own agent was on the pier, running them in our

behalf, we had not made a delivery till we unloaded the cars and till they were taken to the pier and unloaded they were in our possession through our agent.

Now, we make a delivery back in the yards. That is a distinguishing factor that comes right under the terminal switching cases. Now, of course, we can ignore the terminal switching cases and all the other laws against discrimination because we are dealing with the Government, but it is a different question as to whether we can be forced to do so or not.

Now, I want to mention very briefly some of the
531 cases. There was a case at Norfolk 15 years ago, in which the operator of this pier, then the agent of various railroads, tried to force the C. and O. to absorb the charges on the pier and make a similar arrangement. The other railroads were in there doing it and the C. and O. wasn't doing it and never has done it, and isn't doing it now. The Commission found that to require the C. and O.—I should cite the case—I haven't done that—Norfolk Ports Commission versus C. and O. 159 I.C.C. 169.

The Commission found that to require the C. and O. to absorb the charges would be equivalent to requiring the railroad to employ the terminal as its agent and it said there is not obligation on the part of that carrier to employ an outside agency to perform the terminal services under the circumstances of this case.

Now, I think the same holding applies to the instant proceeding.

Commr. Barnard. Well, if the thing could be done at the carrier's convenience, I think what we said in 20911—I wouldn't agree with you on that, but there is force it seems to me on this question of convenience. And if the thing is done at the convenience of the Army, why, we have said something about that in 20911.

Mr. Cousins. All right. Let me come to another case which deals with a different point. McCormick Warehouse
Co. vs. Pennsylvania Railroad Co., 191 I.C.C. 727.
532 This is the full commission decision, and here the Pennsylvania Railroad wanted to do something. The Commission declined to permit the railroad to absorb the charge of the terminal company because it held that the terminals control of the freight would amount to delivery to the consignee under the circumstances in that proceeding and now I quote: "By such delivery to the terminal the freight would lose its character as water-borne and the pay-

ment of an allowance for loading and unloading would be a rebate from the published rail rates on domestic shipments from and to Baltimore."

Now that is exactly what happens on the Army base at Norfolk. We make delivery back in the yard, and the shipper, *i. e.*, the Army, takes full custody, possession, and control, and he stores or does anything he wants with the goods and ships them out on vessels in his own good time. When we deliver the freight on the inside of the yard, outbound cars, and under usual principles that would be domestic transportation not subject at all to the export rates, but the railroads have made a special concession in their tariffs applicable on Army and Navy bases, making the export rates applicable nevertheless to all traffic going there, but that doesn't change the fact that under all of the usual principles that is delivery, and the Commission ought to hold that the railroad is done so far as its transportation duty is concerned.

Commr. BARNARD. Well, as I understand you, the
533 situation is, that the carriers spot these cars at the places where the Army requests them to be placed.

Mr. COUSINS. We don't spot them. We deliver them to interchange tracks.

Commr. BARNARD. I don't mean spot them, but you deliver them to the interchange tracks and that is where, if I get you right, that is where the Army says they want them delivered.

Mr. COUSINS. Yes, sir.

Commr. BARNARD. Is that right?

Mr. COUSINS. They order them there in writing.

Commr. BARNARD. And then pretty entirely with their own motive power they move those cars to where they want to unload them and put them on the wharf—or put them on the—

Mr. COUSINS. Yes, where and when, solely with their own control and direction. That is the contribution we make.

Now there were three cases over the course of the years dealing with a similar situation at Newark, New Jers. v. In the City of Newark case, 182 I.C.C. 51, "the Commission held that the failure of the railroads to accord the port privileges at Newark was prejudicial, but otherwise it found that the railroad had no obligation to unload cars, and so it entered an alternative order."

I make that point merely to show that the Commission has never found that there was any obligation with respect to

this issue except under Section 3, and there it has
534 made some orders, and it issued an alternative order which the railroad complied with by discontinuing the free unloading on the particular traffic involved. The Commission said: No obligation rests on defendant in the absence of unjust discrimination, to load or unload carload traffic or pay and absorb any loading charge that otherwise would have to be paid and borne by the shipper, and this record does not warrant an order requiring defendant to establish provisions for the absorption of loading charge under consideration at Newark."

Now, in that same case there were private piers involved. What I have said related to the public piers of the city, but shippers having private piers came in and the Commission dismissed their request for any relief because it found that the practice at the other ports—it was not the practice at the other ports to perform the service or to pay allowances on the piers of the shippers, and the Commission said:

"We have consistently condemned the absorption of allowances made by carriers to private concerns for services which are essentially a shipper's service".

Three years later this Division reviewed the same situation at Newark in Newark Chamber of Commerce versus Pennsylvania Railroad, 206 I.C.C. 555. Again, you had before you the same issue with respect to public piers on the one hand and private on the other. As to the private piers
535 there, you held again that no case was made and as to the public piers, the issue of discriminations was dismissed for technical legal reasons.

Three years later in the Weyerhaeuser Timber Company case, 229 I.C.C. 463, the situation was again considered by this time by Division 4, but reconsideration was denied by the Commission later. I want to read a little excerpt from that case because that is the most complete proceeding that has ever been had on this subject and what is said in that report fits our situation here exactly:

"Under the present tariffs the rail carriers undertake to load and unload water-borne freight only at railroad or public piers, but in no event at piers controlled by the owners of the freight. At Baltimore the services are performed only at railroad piers, at Camden, Wilmington, and Trenton only at municipal piers, at Philadelphia at either railroad or municipal piers or at privately owned piers which are operated as public piers, but in no case will the service be

performed on piers controlled by the owner of the traffic. * * *"

Now omitting a little and continuing:

"The policy of defendants has been to restrict the port practices as much as possible, consistent with adequate service. Piers other than railroad piers are used only when necessary to supplement railroad facilities. In no case is the transfer service performed at a pier controlled by the owner of the traffic. The reasons for this policy are the
536 difficulty of policing the practice, the necessity of performing the handling at the rail carriers' own convenience, the economy resulting from the consideration over a limited number of piers, and the conservation of revenue", and the Commission went on in that same paragraph to discuss more of the things that I have mentioned today.

Now, I want to turn to two other points. First as to the question of adequacy of pier facilities. Counsel for the Complainant points out that in some of these cases the Commission has noted in coming to its conclusion that the railroad already had adequate piers at the port. I want to make the point that there is no obligation on the railroad to provide piers of any sort to any extent.

Now, if there were, we would have an adequate answer at Norfolk, because as Mr. MacGuineas says, his own witness testified that a couple of other piers in operation there could handle 37 per cent of the traffic passing over the Government pier, and another witness of his said, that the present traffic was ten times normal, so that means that only two of the piers could handle 3.7 times normal traffic and I think we would be sound in contending that we didn't have to provide facilities for such abnormal traffic as ten times normal, because of war, but we have a better defense than that.

There was never any obligation on the railroads under the common law to provide piers where vessels might lie.

Piers are stations for steamship companies, it is up
537 to them or to them or to somebody else to provide their facilities. The Interstate Commerce Act has never placed the duty on the railroad and we have never undertaken it in our tariffs. The only requirement that the Act has ever had is Section 6, paragraph 11, which puts on the railroads the duty to prove a connection to a pier, to interchange with vessels, that is exactly like the requirement of Section 1, paragraph 9, which says that the rail-

roads must provide a connection to a private industrial track, but we are not required by law to construct industrial tracks, and there are a number of other decisions on that point, including many of this Commission.

Chairman ROGERS. Was there any evidence in the record as to the reasonableness or unreasonableness of these rates, the line-haul rates, assuming that you did not perform this service?

Mr. COUSINS. Yes, sir. That is going to be my last point, if you will give me one more minute. We put all that evidence in. It is one-sided but it is there. I was just saying that under Section 1-9, the switch connection case, there is plenty of authority saying that we do not have to do more than provide a connection, but I have been unable to find any case dealing with the question of providing piers and I think that the reason is that nobody has ever thought that the railroads had any duty in that respect, and as you well know, most of the piers of this country are provided
538 by states or municipalities, although steamship companies, railroads, and private shippers have provided piers for their own convenience. The Rivers and Harbor Act of 1919, indicated the view of Congress that all ports should have public piers, publicly owned, and in furtherance of that expression, an investigation was instituted before this Commission, known as wharfage charges at Atlantic and Gulf ports, 157 I. C. C. 663.

The purpose of the proceeding was to encourage the development of publicly owned piers by requiring the railroads to make adequate charges on railroad piers; thus eliminating all free services such as are involved in the instant proceeding.

The position taken by the Secretary of War was quite different from that of the Army in this case, and the report of the Commission indicates that "the railroads have neither the obligation to provide piers nor to absorb charges on non-railroad piers."

Now, I will devote a couple minutes to the question of reasonableness of rates. The Complainant offered no evidence to show that the export rates through Norfolk were unreasonable, as applied to its traffic. The defendants showed that the export rates were depressed on a low level. That results from the fact that Norfolk meets the Baltimore basis of export and import rates, voluntarily, and it puts the rates through Hampton Roads, the export rates and import rates, on a much lower basis, mile for mile, than the rates to any other North Atlantic port,

539 possibly excepting Boston which does the same thing.

Now, the domestic rates prescribed to Norfolk, and to Boston in the Eastern class rate case, are quite different, Norfolk is higher reflecting mileage, but the export rates are the same. Therefore in considering the reasonableness of the rates the Commission should bear in mind the depressed level of those rates as they are today.

Now, second, we showed that in making the rates no factor was included to cover the loading and unloading of freight. When the carriers give the service, it comes as close as anything can come to being a free service. Of course, technically it must be covered by the rate, but when it is not given, or if it should be abolished at all piers, there would be no grounds for concluding that there should be a reduction in the rates because we show at length in the record that the very manner in which the rates were made indicates that nothing was added for these port services.

Now, just in a word, the reason for that is that the domestic rates to Baltimore in the Eastern class rate case were taken as the standards and the export rates were made the same and then of course, the ports were adjusted, and, of course, none of the service was in the domestic rates prescribed by the Commission.

Now, third, as to whether the rates are reasonable or not, this point should be remembered that if the Army
540 were a private shipper it would be paying the domestic rates, all substantially higher because its transportation is essentially domestic, except for the concession we already made of making the export rates apply, especially through Army and Navy bases.

If the Army's theory in this case is upheld I see no reason why it will not apply to other private shippers, to other private piers all up and down the coast, scores of them. If it shouldn't, I see no reason why it wouldn't apply to other Army and Navy bases, the permanent bases up and down the coast. The Navy base at Norfolk not far north of this base is always in operation, it is a permanent base, it isn't like this one, it is much larger than this base, it really handles traffic, and yet we have never gone in there and performed the service, nor have we been requested to and the same is true as to the other permanent bases up and down the coast. There is nothing in the theory of the Complainant's case that shows that the Army is paying rates unlawful from any standpoint, and particularly from the standpoint of Section 1.

Commr. Barnard. The burden would mostly be on the Complainant to establish that after the 4 cents had been exacted the base rate would still be a reasonable rate.

Mr. Cousins. Yes.

Commr. Barnard. And that burden was not discharged, you say?

Mr. Cousins. No. And the Examiner so finds.

541 Chairman Rogers. Mr. Reynolds.

Argument of Charles P. Reynolds.

Mr. Reynolds. May it please the Commission, may I inquire how much time I have.

Chairman Rogers. About eleven minutes.

Mr. Reynolds. I am appearing in behalf of the Southern Carriers who are named as defendant in this case.

The Southern Carriers do not as a rule undertake to handle export-import, coastwise or intercoastal freight between the cars and the pier floors. In other words, wharfage and handling are generally in addition to the rates. But in certain instances, these carriers do undertake, usually through agents, to perform such handling and to absorb the wharfage charges.

Now, at Norfolk this is done only where the Baltimore basis applies and where competition requires it. In other words, since the wharfage and handling charges are absorbed only where the Baltimore basis applies, and where competition requires it, the rate in connection with which that service is undertaken, are depressed rates, and consequently there would be no basis for reducing already depressed rates by the amount of the wharfage and handling charges, if wharfage and handling charges were not absorbed.

I had thought that I would say something about the tariffs of the Southern Lines and go into some detail with regard to operation of the piers. I find I won't have

542 time to do that and all I want to say is: When the Southern Lines do undertake to absorb wharfage and handling charges they specify the pier or the wharf through which the traffic must move.

Now, the Army base piers at Norfolk are not listed in their tariffs as piers through which the traffic may move or the wharfage and handling charges be absorbed. The operation of the piers under Army control has already been dealt with, but I do want to emphasize the fact that the carriers cannot perform the loading and unloading service at their convenience, that the piers must be operated under

the control of the Army, and that it would be utterly impossible for the railroads to perform the service themselves.

If I may be pardoned for doing so, I just want to read two short excerpts from the Examiner's proposed report on this point. He heard the evidence, and he is an able and experienced examiner, and I just want to give you what he says about it. On Sheet 2 he says this, "This work could not be performed by defendants according to their convenience. The freight has to be handled according to priorities and the various unusual and changing conditions that face the Army. For instance, ships that have been partially loaded or unloaded sometimes have to be temporarily moved away from the piers and out into the stream to make room for emergency loading of other ships. Some cars may be unloaded immediately upon placement while
others may be held a short time or the freight therein
543 unloaded and stored on the piers or in warehouses
before being put aboard ship. Frequently the Army has had to load ships day and night to meet a convoy deadline hour, based on calls from overseas for immediate supplies or munitions. All activities on the piers must be supervised and coordinated by one head."

After hearing all this evidence, the Examiner concluded on Sheet 3 of his report, "Obviously anything but Army operation is out of the question."

Now since the railroads cannot perform this loading and unloading service at their own convenience then the principle that you announced in the *Ex Parte* 104 cases shows that they are not obliged to perform this service and they are not obliged to make an allowance if they do not perform it. Actually the Army knows full well that the railroads can't perform the service, and what they are really trying to do is to force the railroads to hire the Army to perform the loading and unloading service and pay them an allowance.

Now, since the railroads have the right to furnish any facility that the law requires them to furnish, they certainly can't be required to hire the Army to do the loading and unloading. As a matter of fact in their exceptions the Army states, "Of course the Army cannot as such require the carriers to hire it to effect shipside delivery at Army base piers," and yet that is really what they are trying to do.

544

ARGUMENT OF ARTHUR L. WINN, JR.

Mr. WINN. I speak for the North Atlantic Port interests represented by the following agencies which were allowed to intervene. The Baltimore Association of Commerce, the Chamber of Commerce and Board of Trade of Philadelphia, the Norfolk Port Traffic Commission, the Port of New York Authority, the Richmond Chamber of Commerce, the State Port Authority of Virginia.

At the outset I wish to make it clear that the North Atlantic ports take no position regarding the controversy between the government and the railroads. Our only purpose is to safeguard the very important port differential rate adjustment and to prevent its being disrupted; and to have the shipside rates continue to be published as one factor rates, as they have been for fifty years.

These ports present a united front against that part of the complaint which suggests that the rates to the Army piers at Norfolk should state separately the terminal and line-haul charges. A joint brief in opposition to the proposal was filed by these ports and they now present a joint oral argument against the proposal. To put the proposal in its proper light, it should be said that the Government does not emphasize or even press the issue. It was included in the complaint along with other prayers, apparently on the theory that it somehow strengthened the com-

545 plaint. Actually the Government introduced no evidence directed to this issue, and your Honors have heard nothing about it in the Government's oral argument this morning, but any possibility of an order of this Commission requiring the separation of terminal and line-haul charges at one of the highly competitive North Atlantic ports, is of grave concern to each and all of those ports, and they introduced affirmative evidence showing the undesirability and the harm that would flow from any such action.

I should emphasize that this evidence, against the proposal, is the only evidence in the record bearing on the matter. The central issue in this proceeding is whether the defendant railroads have been discharged from their responsibility to make delivery at shipside at the Army base piers numbers 1 and 2 at Norfolk.

The Government states that the railroads have such an obligation. Defendants say in substance that if they had such an obligation, they have been discharged by the Government action in taking over the control and operation of

the piers. The North Atlantic ports are not concerned with that issue. If you find that the defendant railroads have been discharged from their duty to make shipside delivery, that disposes of the complaint and it must be dismissed.

On the other hand if you find that the railroads have not been discharged we feel that you should limit your findings and conclusions to the duty of the carriers to perform their obligation, either by performing the required service
546 themselves or by paying an allowance, leaving to the carriers the decision as to which means to employ in fulfilling their duty. We feel that this is the legal limit of the Commission's action on the complaint. As the Examiner has correctly stated under the principles established by the Supreme Court: "The Army has not been hired by defendants to provide wharves or perform the handling service. It cannot require them to hire it."

This principle is familiar and has been followed by the Commission in many cases.

If this view of the law is correct it would seem that the Commission should never reach the issue of requiring a separate statement of terminal and line-haul charges. If the Commission must leave to the carriers the decision whether to perform the work themselves or pay an allowance in lieu thereof, any alternative to the paying of an allowance by a separate statement of the terminal charges, with a corresponding reduction of the line-haul rates would also seem to be a matter which should be left to the discretion of the carriers. The highly competitive character of the rate adjustment to the several North Atlantic ports is well-known. The port differential adjustment is based on one factor rates, which include both terminal and line-haul services and apply to and from shipside. The present port differential adjustment has resulted from decades of port and railroad competition for water-borne commerce, and is not likely to be disturbed. It certainly
546A should not be disturbed except on the most careful consideration, and based on an extensive record, examining at length the results which would flow from any particular change. As I have said, the Government offered no evidence on the issue, and the only evidence of record bearing on the matter is that introduced by the port in opposition. Any separation of terminal charges at Norfolk with corresponding reductions or changes in the line-haul rates, would either give Norfolk an advantage in line-haul rates or, because of the competition of the other ports,

spread to the other North Atlantic ports. In either case the result would be to destroy the port differential adjustment. The separate statement of handling or wharfage would make it practically impossible to maintain a stable rate relationship in the total shipside charges as between competitive ports.

Commr. Barnard. It is necessary for a decision in this case to go into that question as I see it.

Mr. Winn. Your Honor, I am trying to emphasize just exactly that because the complaint here asks your Honor to do that, and we presented evidence showing the harm and the injury that would flow from any such order of your Honor's, and the thing is of such importance that we could not risk or sit by complacently with the United States filing a complaint asking that such a thing be done, and it is for that reason that I have asked for time this morning.

To emphasize the seriousness of the matter, our
547 view is, as you have expressed, that your Honors need not ever reach that question. Each port would naturally seek, in a separate statement of terminal charges to gain a competitive advantage by reducing its separately stated terminal charge. Should any port seek to obtain an advantage, other ports would for self protection be required to enter the competitive rates. It is doubtful whether stability could be restored following such competitive rate cutting until properly related one factor rates were reestablished.

The Port of Philadelphia, as well as the ports of Baltimore and New York, would consider any reduction in the present line-haul rates to Norfolk to be detrimental to them and unduly preferential of Norfolk; conversely, Norfolk would consider the addition of terminal charges to the present line-haul rates only to that port to subject Norfolk to prejudice.

In conclusion, I would like to refer to the Commission's decision in wharfage charges at Atlantic and Gulf Ports 157, I.C.C. In that proceeding the Commission gave exhaustive consideration to the question of the separate statement of wharfage and terminal charges. Originally a separation of these charges out of the one factor rates was presented as to the Southern ports alone. The Commission recognized that such an important question should not be decided without asking the question at all Atlantic and Gulf Ports at one time and on one record. The proceeding was reopened and broadened to bring within the investigation all of the Atlantic and Gulf Ports.

548 A most extensive and exhausfive investigation was had. The arguments for and against a separation of charges were carefully considered and a conclusion reached that no separation should be required. This conclusion was reached in spite of the most ardent advocacy of separation by the United States Shipping Boards and by practically every port except New York.

That decision should not be reversed here and a record which contains no evidence other than that presented by the ports, with a united front against separation.

Thank you.

Chairman Rogers. Mr. MacGuineas?

REBUTTAL ARGUMENT OF DONALD B. MACGUINEAS.

Mr. MacGuineas. I fear there has been some misapprehension as to the mode of delivery at these piers. We think it is not correct, as Mr. Cousins has stated, that the carriers discharged their delivery obligation by putting the cars on the interchange track. The carriers today are making delivery of those cars right on to the pier through the Belt line. The carriers have done that ever since 1920. Our witnesses have testified to those facts, have been present, was engaged in shipping operations at Norfolk for twenty years, and he stated without contradiction that the manner in which the Belt line delivers the cars to the piers, is the same today as it has been for the last twenty years.

Commr. Barnard. You are taking these cars from
549 the interchange track with your own motive power?

Mr. MacGuineas. Permit me to explain that.

Commr. Barnard. You are, aren't you?

Mr. MacGuineas. Yes, under the following circumstances: When the Army took over it entered into an arrangement with the Belt line, whereby it was recognized that it was more convenient for both sides, instead of having the Belt Line make an original placement of each car on to the pier and then have the Army engines handling all switching and interchange, that would produce confusion between engines and loss of efficiency. So, instead of that it was agreed that the Belt line and the Army would pool their engines and indiscriminately handle a car between interchange track and yard as needed. However that was merely a substitute by the Belt line of its obligation to deliver those cars on to the pier.

Commr. Barnard. Was that arrangement put in the record?

Mr. MacGUINEAS. Yes, sir. General Kilpatrick testified as to the substance of that arrangement, and there is nothing in there to give any indication that the Belt line has ever taken the position that it made its placement by putting the track cars on the interchange traffic. On the contrary as I have stated, they have for twenty years consistently run the cars right on to the piers and run them off again, and in substance they are doing the same thing today.

550 Now, I should like the Commission to examine very carefully General Kilpatrick's testimony. He was the port Commandant of the ~~report.~~ As has been stated, he was a very candid witness. I think his testimony was misapprehended in this respect. When he says there has to be overall Army operation, he is speaking not about the particular transaction here in issue, to-wit, the unloading of cars to the pier floor, he is speaking about the operation of the entire facility and in particular the loading and unloading of the ships and the coordination of traffic on the pier with ship loading. Of course as I stated before that has to be done under Army supervision but that is no concern of the carriers. We don't ask the carriers to see that the freight gets into the ship or that the ship ever gets off of the pier. All we are saying to the carriers: they should either perform or make an allowance in lieu thereof, of the specific obligation to unload from car to pier floor. I want also in conclusion to make it clear that as we see this case, the question of reasonableness of the line-haul rates *per se*, is not important in this case.

Commr. BARNARD. Why not?

Mr. MacGUINEAS. We say that when here for over twenty years the carriers have maintained shipside rates, and have absorbed, in those rates, the handling of the cars on the piers, their failure to do that, their discrimination against the Army as between all other shippers at Norfolk,

551 is an unjust practice under Section 1-6, it is an unjust discrimination under Section 2.

Commr. BARNARD. Do you think that would relieve you of the burden of establishing whether that would be an unfair rate?

Mr. MacGUINEAS. Yes.

Commr. BARNARD. Do you think that practice would relieve you from making a record here on this rate?

Mr. MacGUINEAS. Yes, sir, I do. In other words, all we are saying, we are asking the carriers to live up to their obligations which they, themselves, have set out and practiced for 25 years, and the question as to the reasonableness of the return of the carrier—absence of that is immaterial.

Commr. BARNARD. That isn't the question.

Mr. MacGUINEAS. Reasonableness of the rate.

Commr. BARNARD. Decidedly immaterial.

Mr. MacGUINEAS. Our point is this: these carriers, taking advantage of the exigencies of war-time necessity have seized this opportunity to exact from the Government, a return of 4 cents a hundred pounds more than was contemplated by their own rates on more than they are receiving from other shippers in the Port of Norfolk. That is the essence of our case.

Commr. BARNARD. But Mr. MacGuineas, I repeat that I think that you have the burden of showing that the maximum remaining would be a fair rate for the carriers, to the carrier, after you had exacted the 4 cents. You didn't do
552 that as I understand the record.

Mr. MacGUINEAS. Well, as I understand the carriers' contention, they make the position that we have not proven that to receive the line-haul rate without rendering this terminal service, would be above the reasonable maximum. That is their position. Well, we say that is immaterial. The rate is somewhere within the limits of reasonableness, and the carriers, as I say, for 25 years, have assumed that obligation, they are failing to discharge it with respect to the Army, and with respect to the Army alone, and thereby are keeping for themselves 4 cents a hundred pounds.

Chairman ROGERS. The case will be taken under advisement.

(Whereupon, at 11:50 o'clock a. m. the oral arguments in this case were concluded.)

554 Before the Interstate Commerce Commission

Docket No. 29117

UNITED STATES OF AMERICA,

vs.

ABERDEEN AND ROCKFISH R. R. Co., *et al.*

Reporter's Transcript of Oral Argument

Hearing Room "B",
Interstate Commerce Commission Bldg.
Washington, D. C.
Wednesday, April 3, 1946

The above-entitled matter came on for oral argument before the Commission at 10:00 o'clock a. m.

PRESENT

Commissioners BARNARD (chairman), AITCHISON, PORTER, LEE, MAHAFFIE, MILLER, SPLAWN, ROGERS, and ALDRIDGE.

APPEARANCES:

DONALD B. MACGUINEAS, Department of Justice, Washington, D. C., appearing for United States of America, Complainant.

BENJAMIN J. BROOKS, 523 Mills Building, Washington, D. C., appearing as *Amicus Curiae*.

WINDSOR F. COUSINS, 1740 Broad Street Station Building, Philadelphia 4, Pennsylvania, appearing for Defendants.

CHARLES C. REYNOLDS, 1110 Shoreham Building, Washington, D. C., appearing for Southern Carriers, Defendants.

ARTHUR L. WINN, JR., Investment Building, Washington, D. C., appearing for Baltimore Association of Commerce, Chamber of Commerce and Board of Trade of
555-556 Philadelphia, Norfolk Portsmouth Traffic Commission, the Port of New York Authority, Richmond Chamber of Commerce, and the State Port Authority of Virginia.

557 PROCEEDINGS

Chairman BARNARD. The Commission will hear argument in Docket No. 29117, United States of America against the Aberdeen and Rockfish Railroad Company and others.

Before we start into this argument, there is an argument set before Division 2 which will not come on until two

o'clock, as those who are interested in that argument, of course, will be excused if they don't want to remain.

You may proceed.

ARGUMENT OF DONALD B. MACGUINEAS

Mr. MACGUINEAS. May it please the Commission, in this case, Division 2 has found, with Commissioner Barnard dissenting, that the practice of the railroads which served the port of Norfolk in refusing to give the Army either an allowance or to perform the service of handling at the Army base piers is an unjust practice and an unjust discrimination. Division 2 has ordered the correction of that violation of the Act by awarding reparations and issuing an order for compliance as to the future. The government, of course, contends that the position of Division 2 is entirely correct, that they have found the facts as they are supported by this record and that their application of the law to the facts was proper.

At the outset, I think it is of some interest to the Commission to appreciate just which carriers are actually
558 interested in this case. Several of the trunk lines have petitioned for rehearing and reconsideration. Of course, only one, the Pennsylvania, is directly interested in this case, it being the only one of the trunk lines which actually serves the Port of Norfolk. The carriers themselves have shown in this case that the absorption of the handling charges involved is not passed back, in other words, is entirely absorbed by the final carrier.

Commissioner MAHAFFIE. The Aberdeen and Rockfish is taking no position?

Mr. MACGUINEAS. The Aberdeen and Rockfish, as might be expected, has not even appeared in the case. The Southern Carriers do have an interest in the case, although it is a relatively minor one, for the provision for shipside application in their tariff is considerably more limited than in the case of the other carriers.

The two carriers which I think may fairly be said to have the greatest interest in this case are the Virginian and the Norfolk and Western. I think there could be no question that those two carriers handle the greatest volume of traffic over the Army base piers, and it seems to us not without significance that those two carriers have never actively resisted the government's position in this case. Indeed, the Norfolk and Western is now out of the case for all practical purposes because they have made a settle-

559 ment with the government pursuant to which they have paid in full the reparation at the rate awarded by the Commission with three per cent interest and have also agreed to continue to pay reparations at that rate on all applicable future shipments unless and until the order of Division 2 might be reversed and another tariff is entered which makes a satisfactory disposition.

Chairman BARNARD. Well, we have got lots of cases where they are willing to do that. They are not very controversial, these terminal situations.

Mr. MACGUINEAS. I should like also to make it perfectly clear that the position of the government, which I think has been somewhat obscured in some of the carriers' briefs, is that our complaint is as a shipper. It is not a complaint as a terminal operator. We do not contend, and have never contended, that as a terminal operator we would have any right to compel these carriers to hire us to perform the handling services. Our position is that the government is a shipper, which is shipping under line-haul rates, which for 20 years or more at the Port of Norfolk have included within the line-haul rate the absorption of the charges of the terminal for handling the goods; that the carriers ever since the Army took over that pier, due to the necessity of the war, have continued to compel the government to pay the full line-haul rate and yet have refused to render
560 that service which they hold out as part of the service covered by the line-haul rate. So that I trust the Commission will bear in mind that the cases which are cited in the carriers' briefs with respect to the right of a competing terminal operator to handle goods for railroads have no application here because our case is not founded on that theory at all.

As to the facts in the case, I think I need stress only two points here, since, as I have said, we consider that they are very ably stated in the report of Division 2. The Division has found that the control of this terminal by the Army was necessitated by war time measures in controlling the movement of ships and the loading of those ships which, of course, during the war had to be under the most strict and careful supervision.

The Commission has also found that, subject to necessary efforts against sabotage and fire, etc., that the Army has been and is willing for the carriers to come onto the Army base piers and perform themselves that service which they have held out in their tariffs, and to perform that

service in the very same way that they have been doing for 20 years or more.

There has been a question raised as to whether the carriers could have obtained sufficient civilians to handle that service in view of the extensive increase in the volume
561 of traffic moving over the port. In that connection, I wish the Commission to bear this in mind: A considerable portion of the traffic which moves over the Army base piers has been traffic which does not move under shipside rates as to which the Army has never made a claim and which are not in any respect involved in this case.

Now, that traffic would, of course, necessarily be handled at the pier by the Army because the tariffs of the carriers have no obligation for shipside handling of such traffic, and a considerable part of the total labor for handling traffic at the pier would be devoted to such traffic, and, therefore, the fact that the Army actually used Army labor, soldiers, to facilitate movement at the pier does not demonstrate that if the carriers have made a bona fide effort to perform their tariff obligation and perform the handling with respect to traffic moving under such tariffs that they could not have found sufficient civilian labor to do so.

Chairman BARNARD. Do you think the furnishing of these facilities not being required by the carriers is transportation in this situation?

Mr. MACGUINEAS. Yes, your Honor, and I intend to deal specifically with that. I will come to that directly.

Chairman BARNARD. In the first place, you excluded the carriers, you would not let them do it.

Mr. MACGUINEAS. We disagree with that position.
562 and Division 2 has expressly found that the attitude of the Army was to permit the carriers to perform that service if they chose to do so. The carriers, on the contrary, far from seeking to do so have resorted to every effort, if not subterfuge, to avoid performing their tariff obligation.

Commr. MAHAFFIE. How did the Army come to begin doing it if it was the obligation of the carriers and they were free to perform it?

Mr. MACGUINEAS. Because on the day that the Army took over the carriers terminated that service, refused to do it, and never since then have offered to handle a single car on those piers, and the Army was in a position where traffic of the most vital sort to the winning of the war was piling up on the piers. It could not wait and indulge in an ex-

tended controversy with the carriers as to who had the obligation to handle the traffic. It had to move that traffic.

Commr. MAHAFFIE. How was the refusal to handle it by the railroads evidenced?

Mr. MACGUINEAS. Well, in this record the refusal was evidenced chiefly by the ignoring of the Army's request for performance of the service.

Chairman BARNARD. Yes, and the inter-position by the Army because they said, "You don't know how to do it and we do, and you haven't got the people and you have,
563 so we are going to do it under our regulation."

Mr. MACGUINEAS. I respectfully submit that I do not think that the record bears out that interpretation of the facts. I think Division 2's report on that is in accordance with the record.

Commr. MILLER. How much service do you claim the railroads should have to perform?

Mr. MACGUINEAS. Just what should they do?

Commr. MILLER. Just what is that service?

Mr. MACGUINEAS. Just what is it that the carriers should do?

Commr. MILLER. Yes.

Mr. MACGUINEAS. Yes. The only specific service that is in dispute in this case is the matter of unloading cars which are on this pier tracks, unloading that freight from car to pier floor in proximity to the ship's berth, and conversely with respect to import traffic loading the car from pier floor to the car on the track.

Commr. MILLER. The railroads did, however, spot the cars on the piers?

Mr. MACGUINEAS. Yes, Mr. Commissioner. That is the point to which I wish to devote myself next.

One of the chief contentions of the carriers and one of the grounds of dissent of Commr. Barnard was that the in-
dustry car spotting cases principle was applicable
564 here. We think that is not so for several reasons.

In the first place, for many years at this port, at this very facility, it has been the practice of the carriers to place incoming cars onto the pier track. Not only was that the practice before the Army took over this facility, it continues to be the practice under Army control. There has been some confusion in the record as to that fact, and I think the confusion is due to the fact that when the Army took over it entered into an agreement or cooperative arrangement with the belt line in which they said in effect it will be more economical for everybody instead of having the belt line spot on the pier each particular car which has

freight moving under tariff for shipside application and having the Army spot each particular car which has freight not moving under such tariff, we will merely combine our efforts and jointly handle whatever cars happen to come to hand. That arrangement is not in anyway in derrogation of or in nonrecognition of the obligation of the carriers to place the cars onto the piers, an obligation which they themselves by a practical course of conduct for over 20 years prior to Army operation have recognized. We say that when you are considering you are here dealing with export and import traffic, certainly it is in the interest of the carriers and of the railroads alike that that traffic shall be handled in an expeditious and as efficient a manner as possible. Therefore, this handling, quite unlike the car spotting situation, involves a necessary step in the very midst of the transportation process, and certainly such handling is involved as a part of transportation by the very fact of the carriers publishing a shipside tariff. This tariff would be meaningless unless the carriers thereby held as a part of their transportation service the bringing of their car to shipside. That is the very meaning of "shipside tariff."

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Now, unless that is a part of transportation, the carriers have been deceiving themselves for more than five whole years because that is the very thing that they have been doing generally, not only at Norfolk but at every other North Atlantic port and other ports in the country as well, and furthermore the nature of the practice involved in the industry car spotting cases is entirely different. In the rationale behind those cases, as the Commission of course recognizes, is there you had a situation: you had these large shippers who were in a position to exert pressure on a railroad to get rebates and whom the railroads sought—whose traffic the railroads sought, and they were willing to grant rebates in order to get their traffic, and essentially the car spotting practices which this Commission condemned was merely the condemnation of a discriminatory rebate in favor of the large shippers who had these big industrial plants and against all shippers who did not have such plants.

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Now, obviously there is no such kind of rebate or discriminatory practice involved here.

The Army in asking for this service is not seeking any discrimination against any shipper. It is seeking the same service which the carriers have rendered other shippers at Norfolk and at other ports, so we say we are being dis-

criminated against, and certainly the corresponding decisions are no basis for continuing that discrimination against us.

Now, in connection with the car spotting argument, I should like to call to the Commission's attention the very recent decision of the Supreme Court. This was not reported or even decide at the time the briefs were in. It was decide on January 2, 1946. It is the case of Railroad Retirement Board vs. Duquesne Warehouse. That is not yet in the United States Advance sheets, but it is in the Supreme Court Reporter, Volume 66, No. 6. That case involved the question as to the application of the Railroad Retirement Act which performed, among others, the function of loading and unloading freight from cars which came into the warehouse and stayed there and then went on. The Supreme Court expressly took the position that the test of coverage under the Railroad Retirement Act was the same as the definition of "transportation" under the Interstate Commission Act, and the Warehouse there, the Duquesne Warehouse, took the position, "what we are doing in loading and unloading these cars is not a part of the transportation service because it occurs either before transportation begins or after it has ended." In other words, exactly the same position which Mr. Cousins at least has advanced with so much vehemence in the present case. But the Supreme Court disposed of that contention completely and said this:

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"The question is whether Duquesne performed any service in connection with transportation of property by railroad. Duquesne loads and unloads the carload shipments as they arrive at and depart from its platform. We have noted the loading and unloading service rendered by Duquesne. The duty of unloading carload freight ordinarily rests with the shipper or consignee, but it is a transportation service within the meaning of the Interstate Commerce Act," citing several authorities.

"We do not decide whether services other than loading and unloading which are performed by Duquesne are in the same category. It is sufficient for the disposition of these cases that the loading and unloading services performed by Duquesne are services performed in connection with transportation of property by railroads.

Certainly in this case the loading and unloading services held out by the carriers in their tariffs at the Army base piers are services performed in connection with transportation. They are a part of the transporta-

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tion services, as the carriers themselves have recognized by promulgating shipside application tariffs and by performing that service voluntarily.

Chairman BARNARD. Oh, well, because they do not violate Section 6, that does not mean that the tariff is right. They put things in tariffs that ought not to be in there under the line-haul rate.

Mr. MACGUINEAS. I think when you have such a consistent course of conduct for over half a century by a great many of the largest railroads of this country, a practice acquiesced in by carriers and shippers alike, it certainly is of very great persuasive force.

The other position taken by Commr. Barnard in his defense is that we were not entitled to any relief because these rates were depressed; that they were reasonable, having regard to the performance of line-haul transportation without the handling service. As we see it, that is an irrelevant consideration, and I think I may illustrate that by a very simple, homely example.

Suppose the carriers have a tariff rate of $1 for transportation between Washington and Baltimore and as to one passenger, they say, "All other passengers we carry into the Baltimore terminal but you get off five miles out-
568 side of Baltimore. That is all the service we are going to render you, but we still charge you the $1 rate," and then the carrier comes in and defends such a practice by saying, "Well, the rate of a dollar is reasonable for transportation from Washington to a point five miles short of Baltimore."

We just think that is not relevant when the issue is, as here, an unfair practice which consists of not giving to one shipper that service which is called for by the rates and which is rendered to other shippers in a similar position.

Commr. MAHAFFIE. Well, are you here on some theory of discrimination against the Army?

Mr. MACGUINEAS. Yes, we are, and Division 2's report finds that this practice of refusing to give handling service to the Army and yet charging the full line-haul rate is a discrimination against the Army as compared with other shippers in a similar position.

Commr. MAHAFFIE. Do you bring any movements for other shippers that you claim discriminated against the Army?

Mr. MACGUINEAS. Well, there is no complaint that other shippers generally are getting the handling service at the piers for the line-haul rate. We are paying the same rate

and are not getting the service. That is the discrimination.

Chairman BARNARD. A Section 2 proceeding.

569 Mr. MACGUINEAS. That is right, as we say, and Division 2 agreed.

One final point as to the intervention of Mr. Brooks. We agree with Mr. Brooks that what the carriers are doing here is charging us a rate which includes 4¢ per hundred pounds for handling service and which we are not getting. If I understand Mr. Brooks to contend that the carriers could not perform that service if they wanted to, we disagree and Division 2 disagrees. The question as to the mode of relief seems to us no longer in the case. We suggested as an alternative form of relief breaking down the rates into a line-haul charge with a reduction of 4¢ per hundred pounds and a separate charge for the terminal service. The Atlantic Ports resisted that. They contend that will break down the rate structure existing between the different ports, and, frankly, in the light of the Commission's decision in 157 ICC on that question we were not optimistic in persuading the Commission to adopt that form of relief, and it is quite immaterial to us. Division 2 has given us an alternative form of relief which is entirely satisfactory to the government, and hence I submit that the report of Division 2 is entirely correct on the facts and the law and should be affirmed by the Commission.

May I reserve time for rebuttal?

Thank you.

570 Chairman BARNARD. Mr. Brooks.

ARGUMENT OF BENJAMIN J. BROOKS

Mr. BROOKS. In the first place, I want to thank your Honors for permitting me to intervene in this matter as the friend of the Court. I worked on this case for a short time in the fall of 1943 when I was an officer in the Army Transportation Corps and have followed the case right on since then with a great deal of interest.

My approach to the case is somewhat different than that advanced by the government, whose principal ground for complaint is stated to be the failure of defendants to perform the services on shipside traffic at the Army base piers 1 and 2.

Now, as I read the Division 2's report, the government did not win a hundred per cent victory, that is, there was no reparation awarded on shipments which the N&W was the last line-haul carrier from September 25, 1942, through June, 1943.

Now, the question, as I see it, is whether the carriers are entitled to keep the 4¢ per one hundred pounds, which is included in the single-factor shipside rates to cover wharf and handling during the war emergency period when neither they nor their agents supplied the wharfage or handling which have been and are being supplied by the Army on the traffic here involved.

571 I think it is most important to bear in mind that this proceeding does not involve a peace-time situation but a war emergency one, and that is stated as page 46 of the Northern Carriers' petition for re-opening. I quote:

"With the diminished flow of Army traffic and with the likelihood that the piers will soon be turned back into private operation, the issue is clearly reparation."

Now, on water borne traffic moving through the Port of Norfolk from and to the territories here involved, the carriers published single-factor shipside rates which under the tariffs on most commodities specifically include wharfage of one cent and handling of three cents per one hundred pounds, and I might emphasize that word, "specifically." That statement is fully borne out by statements appearing on pages 34 and 35 of the Northern Carriers' petition, and at page 34 they reproduce the Pennsylvania Railroad's tariff provision with respect to terminal services.

That tariff states that on traffic that pays the freight rate of not less than 10¢ per one hundred pounds, or $2 per ton, wharfage charge of 1¢ per one hundred pounds and handling charge not to exceed 3¢ per one hundred pounds, or 60¢ per ton, will be included in the freight rate to or from Norfolk. This means that the carriers hold themselves out to supply wharfage and handling all

572 water borne traffic, with certain exceptions, not here involved, moving through the Port of Norfolk.

As Division 2 said in Terminal Charges of Pacific Courts, 255 ICC 673 at page 676:

"Carriers are obligated to perform or to make allowances for all services necessary to give effect to their published rates."

Now, after the present war broke out the Army set up the Port of Hampton Roads Port of Embarkation and took over Army bases 1 and 2 which had been constructed during the 1917-1918 war, and when completed had been leased to public pier operators, that is, agents of the carriers, as one of the principal facilities used by the carriers in their holding out referred to.

The carriers contend that "the operation of the piers had to be an Army operation and not a civilian one," and for that defendants are required to pay an allowance for a service which was not furnished."

In his proposed report the examiner stated that anything but Army operation is out of the question, and at sheet 9 in the report of Division 2, I quote:

"The record shows that the Army took over the piers only because of military necessity."

The Army was not a mere volunteer. It took over because of the war emergency and very definitely in the
573 public interest.

Now, the carriers not even being in a position, as they claim, to supply wharfage and handling on complainant's traffic, they should have amended their tariffs at the time the Army took over the piers by eliminating the charges, that is, the 4¢ per one hundred pounds for such wharfage and handling from their single-factor shipside rates on the traffic moving over Army bases 1 and 2.

The tariffs not having been amended, the Commission should find that complainant is entitled to reparation in the amount of the wharfage and handling charges in the amount of 4¢ per one hundred pounds on all shipments that have moved over the Army base piers since the Army took over and on those that move up to the time that the tariffs are amended to provide that on shipments moving over said piers from and to the involved territories, 4¢ per one hundred pounds covering wharfage and handling shall be deducted from the shipside rates and paid to the government by way of an allowance.

Commr. Aitchison. When the government took these piers over, was it for a definite period?

Mr. Brooks. Not so far as I know. I don't believe the record so states, but the natural assumption would be that they took them over for the period of the emergency.

Commr. Aitchison. For which it might possibly
574 have terminated the next day. The point of my question is, was it sufficient to put carriers on notice that they ought to change their tariffs? Of course, if it was a mere casual or temporary taking they would not probably be under that obligation.

Mr. Brooks. I don't know as to that, your Honor. The record, I believe, is silent with respect to the negotiations that might have taken place prior to the Army's taking over.

Commr. Aitchison. No, that is not the point. The point is whether or not what the Army did when it took over was

sufficient to put the carriers on notice, according to your theory, to change their tariffs.

Mr. Brooks. Yes, Yes, sir. They had previously provided that export rates, for example, would apply through Army and Navy bases and that when the Army did take over and the Army base piers 1 and 2 became an Army base, then at that time the carriers should have amended their tariffs to provide for the situation because the Army rather than the carriers would perform—probably perform the wharfage and handling at the Army base.

Commr. Aitchison. They could not do it short of thirty days?

Mr. Brooks. Well, they no doubt knew in advance of the Army's taking over that the Army was going to take
575 over and the Commission probably would have given them short notice permission.

Commr. Aitchison. Well, you are piling assumptions on assumptions, aren't you, Mr. Brooks?

Mr. Brooks. I don't think so, your Honor.

Commr. Aitchison. Well, supposing a Second Lieutenant had showed up there with a squad and said, "I am taking this dock over." What would have been the duty of the carrier in regard to changing its tariff?

Mr. Brooks. Well, that apparently did not happen. The Hampton Roads Port of Embarkation had been no doubt notified of this, and there was a great volume of goods coming in there.

Commr. Aitchison. Can we make findings of reparation to award damages on the basis of assumptions as to facts?

Mr. Brooks. Not necessarily, your Honor. They had already provided that the rates would apply through Army bases and it would be up to the carriers then to take care of the terminal service there, the wharfage and handling, either through their own agent or by giving an allowance to the government.

Now, prior to the time the Army took over, the carriers had paid an agent, a public terminal operator, 4c per one hundred pounds for supplying the wharfage and handling
at the Army base piers. In fact, that is a general
576 practice at Norfolk according to the record.

Since then the Army has been handling the wharfage and handling and the carriers have kept the 4c. That is important. They have kept that 4c and have rendered no service for it, in spite of their inability to supply the wharfage and handling in accordance with their own claim

and in accordance with the war needs. If more volume came over the piers, more wharfage and handling revenues and no work at all by the carriers, it is clearly a case of unjust enrichment.

Now, the findings that I have just suggested would be in full accord with the principles laid down by the United States Supreme Court, and the Commission would do full justice to all interested parties, would discriminate against no one, and would give rise to no legitimate claims from private pier operators who handled their own private property over such piers unless the carriers do not have adequate facilities and services available for the handling of such property. The carriers would be paid in full for the services actually performed by them. The government would not in fact be paying twice for wharfage and handling as it has been doing.

Now, Mr. MacGuineas has already mentioned the attitude of the Norfolk and Western and the Virginian. I don't believe he mentioned that the C&O had an
577 arrangement with the government whereby the government took the C&O piers at Newport News and the C&O paid the government an allowance of 50 cents a ton for handling and C&O also furnishing the wharfage facilities, and the Newport News rates, of course, are on a parity with those of Norfolk and most of the period here involved except the short-haul territory.

I want to reserve part of my time, which is quite limited, for rebuttal, but I do want to refer briefly to the case of Wharfage Charges at Atlantic and Gulf ports, 157 ICC 663. That case involves the question as to whether or not the charges for terminal services at the port should be separated from the line-haul charges. The Commission found that they should not. It found that the rail-water terminal facilities are now shown to be insufficient or inadequate. That is important. But, on the contrary, existing facilities are shown, on the whole, to be reasonably adequate to meet normal traffic needs.

I have reached the conclusion that there was no substantial evidence tending to establish any injury wrought by the long-existing practice of publishing single-factor rates to cover the entire transportation service from point of origin of the freight to shipside.

At page 685 in answer to the question "whether a rail carrier may be required to turn traffic over to a
578 municipal or private competing facility at a port and absorb the port charges of the facility to which the

traffic is delivered when the railroad itself has provided facilities to accommodate the traffic is the question here presented," in answer to that the Commission has said:

"A carrier has the right to itself perform any transportation service which it may lawfully be required to perform. Railroads may make such rules, regulations, and practices as will lawfully reserve traffic to their own rails and facilities."

There is no objection to their restricting traffic to certain piers. The decision was a six-to-five-one. If the vote had been six-to-five the other way, this case would not have been brought, as there would be a separation of the terminal charges from the line-haul rates and government would not be paying for the wharfage and handling which it supplies.

Now, the carriers serving Norfolk are admittedly not in a position to supply wharfage and handling such as they are necessary during a period of war emergency and such as have been performed by the Army and the Army base piers. The Army alone was in a position to adequately perform such services. This is not a case where the carriers have supplied adequate facilities and services and the shipper is not using them. Complainant is without question entitled to reparation in full and relief for the future.

579

Commr. PORTER. Well, I just don't get what is your difference with Division 4, Mr. Brooks.

Mr. BROOKS. With Division 2?

Commr. PORTER. Pardon me, I mean Division 2.

Mr. BROOKS. Well, their approach is a little different. They reached their conclusion, as I understand it, on the fact that the carriers after July 1, 1943, should have served. I say that as long as the carriers claim that they could not have served in the manner that the Army wanted or in such a manner as the war emergency required, that, all right, we will not ask them to serve but because their tariffs hold out that they will perform wharfage and handling and the Commission said, "You may perform wharfage and handling provided your services and facilities are adequate," here as I see it their facilities and services are not adequate; the Army had to perform and, therefore, the railroads are not entitled to keep the 4 cents that was in their line-haul rates—or single-factor rates, rather, to cover wharfage and handling.

I reserve the balance of my time.

Chairman BARNARD. Mr. Cousins.

ARGUMENT OF WINDSOR F. COUSINS

Mr. COUSINS. May it please the Commission, I speak for the Virginia Railway as well as the other port lines
580 and, therefore, Mr. Reynolds and I between us represent all of the railroads serving Norfolk except two —the Chesapeake and Ohio, which does not serve the Army base and thus is not involved in this case, and the Norfolk and Western, which, as you have been informed, has paid up. We represent all the other Norfolk Lines, and in addition I represent all of the port lines serving ports from Norfolk to New York, inclusive, all of whom are interested in the principles involved in this case.

Now, if the Commission will permit me to take a few minutes to explain the background of this situation; I think I will be able to dispose of the legal questions, the issues, very shortly. In this case the Army seeks an allowance on all export freight handled over certain piers at Norfolk since June 15, 1942. The allowance sought is 4 cents per hundred pounds, which consist of two parts, three cents for unloading the cars and one cent for wharfage, which means in this case the use of the pier or furnishing the pier.

Now, it has been the custom for railroads to unload certain types of exports, imports, coastwise, and inter-coastal freight; the several classes of what we generally call waterborne freight, and North Atlantic piers within definite limitations. The railroads perform the unloading and pay no allowances to shippers. The privilege is restricted
580A to certain types of piers, the principal class being railroad piers.

Now, that is the situation at Baltimore where the service is performed only on railroad piers, and during the war the Army's export freight had been unloaded by the railroads at Baltimore on railroad piers. At other ports, public piers, that is, piers operated by municipalities or public wharfingers, are included in the tariffs along with the railroad piers, and that is the situation at Philadelphia.

During the war, Army freight has been unloaded on a large public pier by the railroads at Philadelphia, and the situation is similar at the other ports, New York, Newark, New Jersey, Trenton—which does not amount to much, of course—Camden, New Jersey, Wilmington, Delaware, and Baltimore. In no case do the railroads unload freight passing over private piers, that is, piers owned or operated by shippers for handling their own traffic, and there are many of such piers and large quantities of freight passing

over them. They do not receive the unloading service and never have and, as I said, no allowances in any event. Even on public piers, if freight passes into the custody of the shipper, to-wit, leased space, which is not unusual, the privilege is not accorded.

581 We have during the past two years that I know about been very careful about that. My predecessor, Mr. Bickley, used to tell us to mark the line where there was least space, and I have handled this problem since his time, and we have always thought that the law was that freight coming into the custody of the shipper at the port was not entitled to this privilege.

Now, the various limitations have been reviewed by the Commission in at least a half dozen cases, and in every case they have been approved, and in one case against my argument they have been required.

Chairman BARNARD. I am bothered a lot about this 4-cent business. What is your position as to your arrival at that 4 cents? That the tariff specifies that that covers certain handling of this stuff? The arguments being made are that it is an unjust enrichment.

Mr. COUSINS. I understand, Mr. Chairman.

Chairman BARNARD. I wish you would straighten me out on that.

Mr. COUSINS. I will. I would like to reserve the detail of that for a little later, but I will say at this time that the record shows beyond any question of a doubt that the export rates contain no factor to cover that 4 cents. The export rates apply whether or not the service is granted or the 4 cents pay on large quantities of traffic.

582 Furthermore, the unloading privilege, as I want to show more in detail, has never been accorded at all export or import freight but only that part of it which meets certain qualifications.

Chairman BARNARD. Well, what does the tariff say this 4 cents covers? If the tariff says that it covers these things that are contended for by the government and it is retained by the carrier, why—

Mr. COUSINS. The tariff says at Norfolk that that is the amount of compensation. It erroneously called it an allowance, we think. I define an allowance as something paid to a shipper out of a rate. The tariff says at Norfolk we will pay our agent 4 cents to cover unloading service and furnishing the wharf in our behalf.

Now, that is an important point in this case, and I do not want to get too far into it until I have explained the entire background, but I am going to cover that.

I think Division 2 has erroneously interpreted the tariff and given them an interpretation that nobody supposed was intended, but I would like to get on for just a moment because I have not yet explained what we do at Norfolk, and that is my next point.

Now, at Norfolk, the railroads with few exceptions, have not operated their own piers but have made use of public piers and have designated the terminal operators or
582A public wharfingers as their agents to perform certain railroad services. Thus, for about 20 years this Army base, like half a dozen other facilities at Norfolk, was leased from the government and operated by public wharfingers who offered the usual services to shippers in connection with trans-shipment between railroad car and vessels. The railroads severally entered into agency arrangements with the terminal operators to perform services on their behalf, and to the operator they paid the four cents. In their tariffs, the railroads did not hold specifically to provide any wharf or unload freight but, rather, they stated that they would absorb the charges of the terminal operator, their agent, in amounts not exceed 3 cents for unloading and 1 cent for wharfage.

In substance, the practice at Norfolk has been identical with that at the other North Atlantic ports. There are these differences:

At the other ports we perform a service ourselves and say nothing about any limitations on cost. No matter what it costs we unload and pay our unloaders whatever the going labor rate is. We do not at other North Atlantic ports pay the terminal operator anything for the use of the wharf or make any allowance to anybody for the use of the wharf. We only furnish wharfage at the other North Atlantic ports to the extent that we happen to have
583 railroad piers. That is not at all true at some ports like Camden and Wilmington, and it is true to some extent at other ports like Philadelphia and Newark.

Now, at Norfolk we put a 3 cent ceiling on the unloading costs that we would absorb, and we added one cent for the use of the pier. There is that slight difference.

Chairman BARNARD. Well, do you in the tariff—and I am going to insist that I have an answer to this—do you in your tariff break down this line-haul rate and add this 4 cents, or what do you call it in the tariff?

MR. COUSINS. Well, I will read you the tariff.

Chairman BARNARD. Yes, please.

Mr. COUSINS. The Army base at Norfolk is served by the belt line railroad, which is a little switching line owned

by all of the other Norfolk lines, and it performs the switching in our behalf. The trunk lines, all of them, refer to the piers where they will perform this service through their agents, and the last reference in the tariff which touches upon the Army base is under the heading of "Transport, Trading and Terminal Corporation," which was the public wharfinger and railroad agent which was dispossessed by the Army on June 15, 1942.

Now, the tariffs of the trunk lines all refer to that agency, and then they speak about the charges of the Norfolk and Portsmouth belt line which they say will
583A be added to the rates at this pier with respect to export, import, and so forth, traffic where the wharfage charge of 1 cent and handling charge not to exceed 3 cents per hundred pounds will be included in the freight rate to and from Norfolk. Now, that is a Pennsylvania tariff.

Now, here is a Virginia tariff.

Chairman BARNARD. If that is included in the freight rate, there is 4 cents that is going out for something.

Mr. COUSINS. That is right.

Chairman BARNARD. And you are not doing it?

Mr. COUSINS. That is right.

Chairman BARNARD. And you are retaining the 4 cents.

Mr. COUSINS. That is right, and we have for 50 years, and we expect to for the next 50 years.

Chairman BARNARD. If somebody does not interfere with you.

Mr. COUSINS. If we can get rid of this report of Division 2, and I will explain why. It is nothing extra. It is exactly what the Commission told us to could do.

Chairman BARNARD. But the tariff says it is.

Mr. COUSINS. But you overlooked the limitations, Mr. Chairman. We only do it on public piers designated in the tariff and we only do it in respect to certain traffic, all as outlined. The government's traffic does not meet the conditions.

584 We say in our tariffs that we will charge certain export rates too which are lower than domestic rates, but the shipper who may ship his freight to the same port in Norfolk does not get the benefit of export rate, upon which the rates are based. Here is what the Virginian tariff says.

Chairman BARNARD. Now, wait a minute. I understand that you do not attempt to do this at any public pier; is that right?

Mr. Cousins. We do it at public piers.

Chairman Barnard. I mean you do it at public piers but not at any privately owned piers?

Mr. Cousins. That is right; not for any shipper controlling his own freight. That is the difference. Now here is what we did prior to the time the Army took over the piers. For the 22 years more or less during which time the piers were in the hands of public wharfingers, railroad agents, the belt line delivered traffic direct to the piers as the agent of the trunk line railroads, that is to say, it took them down through this base line proper, as was recited this morning, and placed them right out on the pier where they could be unloaded.

Now, occasionally the terminal operator performed some of that switching himself, but he was our agent. He did not charge anybody for doing that except to the extent we paid him. He acted for us. Under the arrangement the
585 freight was at all times under the custody of the railroad until delivered to vessel. There was no interference of the shipper. The so-called allowances to the terminal operator were in effect payments of a legal service to the railroad agency.

Now, the significance of that operation was that railroad delivery was accomplished at shipside after unloading of cars. The railroad's custody of the freight continued and the integrity of the export character of the freight was maintained.

Now, after the Army took over in June, 1942, and after it had dispossessed our agent, the increased volume of Army freight was handled in a different manner. Interchange tracks were established within the base enclosure about two miles back from the piers near the railroad entrance. No cars were delivered to the Army base by the belt line until ordered by the Army. They were all classified out in the yardway of the railroads. They were switched to the base only as ordered by the Army, and there they were placed on designated interchange tracks as directed by the Army, all of that being two miles back from the piers in the Army enclosure. From then on the railroads had nothing to do with the freight except in an incidental manner, which I will mention in a moment. The Army disposed of the freight in its own way at its own con-
586 venience. It switched the cars itself on back to the piers or to storage or hold tracks.

Commr. Miller. Well, you claim then that your lost possession of the freight?

Mr. Cousins. We certainly did, Mr. Commissioner, and it was not even subject to export rates, except for the fact that the railroads of the country made a special concession to the government at the request of the Secretaries of the Army and Navy, making applicable export rates to the Army and Navy bases. They did that with respect to only export rates, not coastwise or inter-coastal, and the Army is not entitled yet to the classification of this freight at this port, although Division 2 makes its findings with respect to all those classes and not in respect to export freight.

Now, the significance after the Army took over was that shipments were accomplished by the exchange of freight over interchange tracks as and when ordered, and there could not be any doubt that the railroads were permitted to perform subsequent shipping within the Army base even if they had been called upon to do so, which they weren't, and even if they had been able to do so without interference, which they would not have been, except that rebates to the government are not illegal. The railroads were not called upon to do the switching, and the
587 subsequent unloading service after the switching is one step further removed.

Commr. Mahaffie. How did the Army do this switching? Did it have its own equipment or employ the belt line equipment?

Mr. Cousins. No. I said that there was one exception in what we did on the pier. When the Army took over the belt line had a little switching locomotive on that pier which is left there, and it furnished that locomotive to the Army with two crews per day. Then the Army had its own switching locomotive on the pier which worked seven to nine crews per day. Therefore, the railroads furnished about one-fifth of the switching on that pier. All of it was under the direction of Army yard masters; none of it under the direction of the railroad, and I think that as Examiner Disque found, that it can be regarded only as a contribution to the government, the furnishing of that locomotive, a contribution that would not be legal to the ordinary shipper but is all right in the case of the Army.

Commr. Miller. You made no charge for it?

Mr. Cousins. Sir?

Commr. Miller. You made no charge for that locomotive?

Mr. Cousins. We made no charge?

Commr. Miller. I asked you, did you?

Mr. COUSINS. We contributed that, sir, and that was about one-fifth of the service which the Army needed.

588 When the Army took over the piers in 1942, it announced that they would be operated for its exclusive use and that it would perform all the services. Its announcements are contained in the record, Exhibit 1, offered by the complainant. The only demands made on the railroads were for an allowance, not for the performance of any service either on wharfage or handling. This demand for an allowance continued for a full year lacking three weeks, with much correspondence. Then a demand for unloading service was made on the Pennsylvania Railroad, in the words of the Commandant, as a prerequisite to filing a complaint with the Commission. Examiner Disque termed that a gesture. The formal complaint filed in the case prays only for allowances and asks for no performance of service, although Division 2 makes a statement to the contrary.

Chairman BARNARD. Well, you did not offer to perform the service; did you?

Mr. COUSINS. Of course not.

Chairman BARNARD. You did not think you had to?

Mr. BARNARD. Exactly so, and we could not have in any event. Now, that is my next point.

The testimony of complainant's witnesses, my friend, General Kilpatrick, who is probably watching Barnum and Bailey's circus today because he has returned to Madison Square Garden from whence he came—General Kil-

589 patrick, the Commandant, and apparently a very fine type of man and honest and forthright witness who answered my questions to the discomfiture of my opponents—his testimony makes clear that the railroads could not possibly have performed the unloading of cars within any reasonable standards, and Examiner Disque so found.

Now, this point will be covered more fully by Mr. Reynolds, so I only want to mention three admissions of the General.

One. That the railroads would have been obliged to use troops. Of course, he used not only troops but prisoners of war.

Two. That they could not have performed it at their own convenience.

Three. That they would have been obliged to pool their services; that is, all eight of them worked together through an agent or somehow not come in and perform their obligations severally.

Now, in several recent terminal switching cases, you said that pooling of services does not meet the test. If railroads cannot do it alone, they may not be permitted to do it together to ease up the situation. The record is clear that the Army never expected the railroads to unload cars. If this had been considered practicable the Army would have left the facility in the control of the terminal operator and thereby it would have secured the advantages
590 that it seeks in this case.

I have already mentioned that when they took over the pier the export and other water-borne rates became applicable and a concession was necessary to make them applicable to this freight. Since the war ended, the railroads have expanded—and quoting from Section 22—"to include freight which reached the ports intended for export, whether exported or not."

Chairman BARNARD. Well, your position, as I understand, is that this 4 cents does not apply to this government traffic?

Mr. COUSINS. That is right, or to the traffic of any shipper—

Chairman BARNARD. And a majority of Division 2 misinterpreted that provision in the tariff when it applied it to this handling of this stuff on the piers?

Mr. COUSINS. That is correct.

Chairman BARNARD. That is your position, isn't it?

Mr. COUSINS. Yes, that is part of my position, I agree with that, sir.

Now, let me discuss the issues briefly. There are a half dozen of them. I have come to that point. In the first place is the unreasonableness of rates. That was the theory upon which General Kilpatrick made his demands on the Army. He said, just as Mr. Brooks now says, that
591 the railroads should make restitution because they charged for service not rendered but provided for in the line-haul rates, that the line-haul rates were built up on the basis of the added service. Now, the majority of Division 2, which decided this case against us—was not able to find that rates were unreasonable. Neither did the examiner. So I don't want to take much time discussing that point.

The evidence is wholly one-sided in favor of the railroads and proves without doubt that rates were not unreasonable. Just stating our reasons as quoted by the record for my contention that there can be no finding of unreasonableness of rates, the records show that the line-haul rates contained

no factor for this service. Nothing was ever added. The port lines bear the entire cost, not their connections.

The export rates, as you know, are based on domestic rates. At Baltimore most of the export rates and domestic rates are the same. We started, and after the Commission decided the Eastern Class Rate case and applied the export rates on the Baltimore basis, of course there was nothing in the domestic rates that you prescribed to cover unloading cars and neither was there any identical—I should have said that there was nothing in the domestic rates when you prescribed them for the unloading or
592 wharfage and, of course, when we applied the domestic rates there was no basis for them there. Many commodities move and always have moved on export rates without getting this service, lumber, heavy and bulky articles, tank car commodities, open car commodities—all of them take the same export rates but they do not get this free unloading. The privileges, as I have said, are held out only on public piers. All the export traffic passing over private piers does not get this service.

Finally, the Norfolk Export rates are depressed in any event. They are the same as the Baltimore rates, although the domestic rates to Norfolk are substantially higher and distances are substantially greater, but Norfolk equalizes its export rates with Baltimore, and it so happens that at the sixth class level they are just about 4 cents under what they should be.

Now, Division 2 found that the practice of the railway was an unreasonable practice, not unreasonable rates but an unreasonable practice for the railroads not to furnish this service that had formerly been covered by the 4 cents. That must mean that it was unreasonable for the railroads not to supply a wharf after the government seized their facility and put their agents off. There is no reason indicated under this section for the award of more than one fourth of the reparation here other than that the
593 railroad should have supplied a wharf which, of course, was not demanded. The wharf that was operating was adequate, but the government took it over.

Of course, all the government wanted was an allowance. Now, the railroads don't have any obligation whatever to provide wharves and never have. The common law does not place any such obligation on them, the Interstate Commerce Act places no such obligation on them, our tariffs undertake no such obligation. The only obligation we have is that con-

tained under the Act to provide a connection to a wharf within reasonable circumstances, exactly the same way as we have to provide a connection to an industry switch track. We had no obligation to perform a wharfage service.

Now, the Division holds that it was an unreasonable factor just not to come and unload. I have already covered that as far as I intend to. Mr. Reynolds will go further. The point there, of course, that we were never expected to unload by the Army. Anyway, they took it over themselves or our agent would have gone ahead and unloaded and we certainly could not have done the job within those applicable standards.

Now, Division 2 found that our tariffs which refer to this absorption of 4 cents payments to our agent and all, and that mentioned the facilities specifically where we will
594 perform the work—Division 2 held that those tariffs do not mean that we will pay so much compensation to designated public wharfingers as our agents but mean that we will pay allowances on those piers mentioned, that is, that the Transport, Trading and Terminal Company's pier—that was our agent before the Army took over; that the Army base continued to be known as the Transport, Trading and Terminal Company after the Army took over and the 4 cents absorptions continued to apply.

Now, let me read what the belt lines tariff says, and this is the tariff that the trunk lines all refer to, and it covers either the charges or the obstructions, and I may as well admit in passing that the tariffs at Norfolk are somewhat loosely drawn. They are not perfect by any means. The tariffs of the different companies differ and they are not what they should be, but they have never been misunderstood. No shipper during all this time has tried to make a shipment, so far as we know, to the Transport, Trading and Terminal Company while the Army had the pier and get his freight unloaded by that company at our expense. Of course, he could not do it because you have to make your arrangements first. The Army was misled because they came to us and asked us to change the tariffs. They did not assume that the tariffs continued to apply to their traffic. They asked for a tariff change which we declined.

595 Here is what the belt line tariff says:

"For the use of wharves, warehouses, slips, channels, tracks, and approaches and other facilities at the Lincoln Tidewater Terminals, Incorporated, and/or Transport,

Trading and Terminal Corporation, Norfolk, Virginia, and for other services rendered by the Lincoln Tidewater Terminals, Incorporated, and/or Transport Trading and Terminal Corporation as agent for Norfolk and Portsmouth Belt Line Railroad Company, the Norfolk and Portsmouth Belt Line Railroad makes an allowance, equal in the amount of charges provided in this tariff, or as amended, * * * except * * *".

We are not concerned with the exceptions. Now, how that tariff can be interpreted as granting an allowance to the Army for handling its own goods is inexplicable to me.

Now, there is a Section 2 finding against us. The Section 2 finding means that while we did not pay the Army an allowance we continued to handle like traffic of other shippers under similar circumstances and unloaded it for them. Now, my answer to that is that we did not pay any allowance to any other shipper at Norfolk. We would unload export freight of other shippers if they had any during the war over designated public piers. We did not do it for any shipper if he intervened and took control of his traffic the way the Army did. If a private shipper had been
596 operating this pier, the Army base, he would not even have received the export rates, let alone this additional service. It would have been clearly a rebate to do that for any shipper, and yet what Division 2 says about the applicability of the tariffs applies just as well to any private shipper like the United States Steel Company who might have taken over the pier, as it does to the United States Army.

Now, I will just say a word about the cases that have been decided here before. There is a whole series of them. I participated in most of them. I have not any time to discuss them, but I will say that right down the line the practices which I have attempted to describe this morning have been upheld in almost all cases, and required against our own effort to avoid the rule in one case.

Now, Division 2 relies upon its own opinion in a Boston case in which the New Haven Railroad has tried to withdraw a terminal facility from its tariffs on the theory that the Army traffic moving over that pier had so predominated it that it had ceased to be a public commercial pier and that therefore it should no longer hold it out in such tariffs.

Division 2 suspended the tariffs and declined to permit the withdrawal of that as a station facility, but the result of the case was exactly opposite to what we have here.

The Division held that the pier had not lost its char-
597 acter as a public commercial pier; that the railroads should be required to continue to unload commercial freight, not government freight, commercial freight, passing over the pier, and the report shows that the operation there was similar to the operation as it used to be in the Army base, that is, that the New Haven switches the cars right into the pier where it unloads them.

Now, it is difficult for me to interpret the opinion of Division 2. I cannot escape the conclusion that if anyone but the United States government had been the complainant in this case the result would have been different. The service sought would have been found to be beyond the railroad obligation. I think that is established in all the cases, the port cases, and all of your terminal switching cases. You would not have permitted any such service to be rendered or any allowance to be paid to a private shipper.

Commr. AITCHISON. Well, if this pier had been deeded or leased to a private shipper, you would have changed your tariffs, wouldn't you?

Mr. COUSINS. We would not have had to change our tariff, no, because our tariffs do not contain any holding out that this service will be provided on a private pier.

Commr. AITCHISON. I thought it named this pier.

Mr. COUSINS. It named the company, Transport,
598 Trading and Transport Corporation, which operated as the pier, and wherever that corporation goes and operates a public pier, the tariff follows it.

Commr. AITCHISON. Well, assume that they had gone into private mercantile business.

Mr. COUSINS. We would not have had to change any tariffs, no sir, and there would have been no unloading service granted and no compensation trade and we would have had no agent there. Now, if the Transport, Trading and Terminal Company gave up its status as a public wharfinger and began to ship freight of its own, handle its own freight, we would not have paid it the 4 cents compensation and the contracts so provide. The terminal operators get no compensation for handling their own freight if they have any.

Commr. AITCHISON. Well, wouldn't you have had to change your tariff?

Mr. COUSINS. No, I think not.

Commr. AITCHISON. Doesn't the tariff take precedence over your contract?

Mr. Cousins. There is nothing in the tariff, in my opinion, that would have held out any railroad service on Army piers 1 and 2 if they had been operated by a shipper. The tariffs provide that service only while they are operated by the designated railroad agency.

Thank you very much.

599 Chairman Barnard. Mr. Reynolds.

ARGUMENT OF CHARLES P. REYNOLDS

Mr. Reynolds. May it please the Commission, I am appearing on behalf of the Southern Carriers that serve the Port of Norfolk, Virginia.

In his dissenting opinion in this case, the Chairman of this Commission, after pointing out that the rates charged the complainant were not in excess of reasonable maximum rates, made this statement:

"Furnishing the wharf and handling the freight at the Army piers are not transportation, but merely facilities provided and work done by a shipper for himself on his own property and at his own convenience, before and after the transportation is performed. Defendants may not, therefore, be required to provide a wharf or handle the freight on the Army piers, and not being required to do, they are not compelled to pay an allowance in lieu thereof."

Now, in my argument I shall try to convince all of you that the Chairman was correct, as I am convinced that he was, and that the decision of Division 2 in this case compells the railroad to pay the government an allowance for services which are not a part of transportation.

Ever since the Commission's decision in Propriety of Operating Practices—Terminal Services, it has been settled that "where the carrier is prevented from per-

600 forming at its ordinary operating convenience any further service, by the nature, desires, or disabilities of a plant" it is not obligated to perform such further services and that transportation ends when the cars are placed on designated interchange tracks.

Now, this is true, although the shipper might be entitled to the further service if that service could be performed at the operating convenience of the carrier. It follows from their holding in the Terminal Cases that if the carriers could not have loaded and unloaded the Army traffic at the Army base piers at their ordinary operating convenience, they were under no duty to do so and under no duty to make an allowance, and if they could not go on the

Army base piers and load and unload these cars, then they certainly were not obligated to make the Army an allowance for wharfage.

In those circumstances, the Wharves and piers must be considered as private facilities of the Army as, in fact, they were. Moreover, as Mr. Cousins has pointed out, neither the Interstate Commerce Act nor the common law places any duty upon the railroads to furnish wharves and piers.

I want now to consider the evidence. First, the evidence showing that the Army neither expected nor intended the carriers to perform the services for which they are
601 now seeking allowances and, second, the evidence showing that the carriers could not have performed these services at their ordinary operating convenience. The Army took possession of the Army base piers on June 15, 1942, thereby dispossessing the Transport, Trading and Terminal Corporation which had operated the piers as the agent of the carriers.

On August 17, 1942, the War Department advised one of the carriers as follows, and I quote:

"The Terminal properties will be operated and controlled by the War Department. Use of the facilities by the other armed forces or by private concerns will be by the express permission of the War Department.

"It is intended to use the terminal facilities for government traffic only. However, circumstances may require the handling of commercial freight and in either instance the War Department or its agency will perform all services."

I do not see how words could be much clearer than those in showing that the Army took the Army base for its own use, that it intended to perform all services itself there; that it neither expected nor intended to permit the railroads to do that.

Chairman BARNARD. Well, of course, their position is, "Yes," because you could not do it, but if they had to do it that they were entitled to be reimbursed for doing it
602 by you because it was your obligation. Of course, that is their position, which I do not agree with.

Mr. REYNOLDS. Well, I think Mr. Cousins made it very clear, Mr. Chairman, that the carriers' tariffs do not impose upon them any obligation to perform the services under the circumstances here present. Now, after the Army began operating the piers it made several requests for an allowance, and it was not until the first of May in 1943 that

they asked the carriers to perform the service, and then the request for performance was made only as a prerequisite, in their own words, to the filing of a complaint with this Commission, and the complaint itself when it was filed on April 15, 1944, did not seek specifically to have this Commission require the carriers to perform the service. The relief sought by the complaint in addition to reparations was either an allowance or that the lineshaul rates be reduced by 4 cents per one hundred pounds.

Commr. SPLAWN. Did the carriers fail to perform any service here, Mr. Reynolds, as far as these export movements were concerned?

Mr. REYNOLDS. No. No, sir.

Commr. SPLAWN. This company that you say went out of the picture at the moment, was its name?

Mr. REYNOLDS. Transport, Trading and Terminal Corporation.

603 Commr. SPLAWN. Ordinarily the carriers through that corporation got these shipments through; is that correct?

Mr. REYNOLDS. They got certain shipments through; yes, sir.

Commr. SPLAWN. And the Army was substituted for that corporation?

Mr. REYNOLDS. No, sir. The Army dispossessed that corporation and took the piers for its own convenience and for its own purposes.

Commr. SPLAWN. Yet it did substitute itself for that corporation?

Mr. REYNOLDS. Well, it dispossessed the corporation and it took possession of the piers.

Commr. SPLAWN. It did what that corporation had been doing?

Mr. REYNOLDS. No, sir. It did not. It did not do what the corporation was doing. It handled the traffic differently and as the necessities of the situation demanded and—

Commr. PORTER. And it did not operate them as agents for the railroads as the company did that it dispossessed?

Mr. REYNOLDS. It did not, sir.

Commr. AITCHISON. And did it deal with the public itself?

Mr. REYNOLDS. It permitted a few commercial ship-

604 ments to pass over the pier, but General Kilpatrick testified that he had had some unfortunate experiences with commercial shipments and that he had restricted the use of the pier by commercial shipments, and I think

during the whole period covered up until the time of the hearing some 700 cars of commercial freight had moved over the pier, but those cars contained freight that would not be entitled to wharfage and handling.

Commr. SPLAWN. Well, as a matter of fact, this spotting of the cars by the roads was just the same, wasn't it? It was in the terminals and in the yards?

Mr. REYNOLDS. No, sir; it was entirely different. Mr. MacGuineas is mistaken in his statement that the belt line placed the cars on the piers. The superintendent of the belt line testified to the contrary, at page 201 of the transcript.

Commr. SPLAWN. Well, as I understood Mr. Cousins, the superintendent sometimes had—or was it someone else—sometimes he had one of you do the spotting instead of the belt line.

Mr. REYNOLDS. Well, I am going to cover that in a moment. I am going to talk about the operation of the pier, and after the Army took over.

Commr. SPLAWN. Well, I just want to get it clear to see if I understand it. If I fell into an error, I want to
605 correct it.

Mr. REYNOLDS. Well, I will cover that right now. The way the cars were handled was this:

The belt line has an assembly yard over in Brechter, which is across the river from the other base piers. It moved those cars from Brechter to the Army base piers at the orders of the Army. It placed the cars in a storage yard at the Army base on storage tracks designated by the Army.

Now, after those cars were placed on those tracks, they were moved to the piers or to the points in the base at the control and direction of the Army, with Army locomotives and Army crews, except, as Mr. Cousins stated, the belt line furnished one engine and two crews, but the one engine and two crews of the belt line were under Army direction and control.

Commr. SPLAWN. They were under the direction and control of that Army, which had been its engine in peacetime?

Mr. REYNOLDS. Well, the belt line owned the engine, but the crew of the one belt line engine was under the control and direction of the Army in moving the cars from the storage yards and to the piers and to other points in the Army base.

Commr. SPLAWN. Well, the storage yards were by reason of additional traffic, and there was no objection on
606 the part of you or other lines to the use of the storage yards and to the way they were used; was there?

Mr. REYNOLDS. Well, they were the Army's storage yards within the Army base. We had nothing to do with them except we put the cars in those yards on the tracks designated by the Army.

Commr. SPLAWN. Instead of on the belt line switches as you had done in peace time?

Mr. REYNOLDS. Well, in peace time we had an agent who operated it.

Commr. SPLAWN. And this war time Army substituted itself for that agent and did what the agent had been doing?

Mr. REYNOLDS. No, sir; I do not agree with that at all. The Army dispossessed our agent, if you want to use that term. He kicked him out, in other words, and the Army operated in a different manner.

Commr. SPLAWN. Well, I will not interrupt you further. I think it is obvious as to what I have in mind, and you can clear that up.

Mr. REYNOLDS. Well, if I have not cleared it up, I would like very much to do so.

Commr. SPLAWN. I will read your brief again.

Mr. REYNOLDS. Thank you.

Now, under well established principles, the freight was delivered to the Army when the cars were placed on
607 the interchange track, and this being true the carriers were under no duty to go on the piers and unload the cars when the Army placed them there, and neither were they obligated to make the Army an allowance for wharfage.

Moreover, complainants' own evidence shows that the carriers should not have placed the cars on the piers or loaded and unloaded them at their convenience.

I want to deal now with that evidence, because I think it quite important and quite convincing that the railroads could not have performed the service at their convenience. Complainants' evidence establishes the following facts:

"First: The Army base could not have been operated under civilian direction. General Kilpatrick, the Commanding General there, testified:

"'Q. In your opinion, why did the Army think it necessary to take over this pier instead of making use of the pier under the prior public operator?'

"A. That would not have been feasible at all, because the Army has to control the overall operation, the bringing of the cars in, the allocation of ships, and so forth. It has to be an Army operation. It cannot work under civilian direction, I do not think."

"Second: The loading and unloading of the cars on the piers had to fit in with the operation of the base as a
608 whole."

Asked "What is the difference between the operation of the piers now from what it was prior to 1942?" General Kilpatrick replied:

"A. The government controls the priorities of loading and the type of loading, it controls the stevedores in how they work and when they work, when they work overtime, and when they work straight time. The car unloading has to fit in with the overall picture.

"A civilian organization should not handle the freight from the depot into the ship. That is supervision that the Army has to furnish and a coordination that the Army has to furnish."

"Third: The urgency of movement was paramount, convoy dates had to be met, and the supply of civilian labor was inadequate."

General Kilpatrick testified:

"There is not in this vicinity sufficient civilian labor, in my judgment, to do that job. It must be supplemented by Army labor, I mean to meet the peaks and the emergencies with which we are faced. We have a convoy deadline to meet and we have to work day and night.

"In other words," he said, "The urgency of the movement is paramount regardless of who does the work, whether it is soldiers or civilians or what. We have
609 to keep our freight moving. We have to load our ships, and we have to meet our convoy dates."

"Fourth: The Army had difficulties which commercial interests do not have."

The General testified:

"With the big flow of freight coming in and with the uncertainty as to specific delivery dates, we have a difficulty which commercial interests don't have. We have to load bottom cargo first, then filler cargo, then on top of that blow-up cargo."

"As freight comes into the piers, we are sometimes in need of bottom cargo and have to hustle those cars in right down to the piers and work them, whereas other cargo

for that same ship or for the same cargo which is loaded later in the loading cycle may be in the port for several days."

It is obvious, I think, that the manner of loading the ships has a direct effect upon the unloading of the freight from the cars to the pier floor, the service for which the Army seeks an allowance.

The fifth point to which I want to direct your attention is that the Army unloaded the freight from the cars in its own peculiar way and to suit its own convenience. Sometimes freight was unloaded direct from the cars to the ships without touching the piers.

On this point, General Kilpatrick stated:

610 "At times the freight comes right out of the car and into the ship without ever touching the pier except to be carried across it in motion."

Sometimes freight was unloaded on the pier then reloaded into cars and taken back to the depot or placed on another pier.

The General testified:

"After we have brought freight into load on a ship, overseas will tell us they do not want flour or they do not want oil or gasoline, but want something else put in the space in the ship that we had intended to put this particular type of freight in; then it might remain on the pier for some days until another convoy or until we had space to get rid of it, or ship it back to the depot; and also certain small quantities of freight might stay on the pier some days when they are shut out."

Sometimes ships are in process of loading and moved from the pier out into the stream to make room for other ships.

Emphasizing the necessity for Army control and supervision of the base, General Kilpatrick states that this control must include, and I quote:

"Everything, ships, cargo, and everything. Bear in mind we have embarkations and debarkations. We handle prisoners of war over these same piers at the same time. We even have to move a ship out into the stream that is

611 loading cargo in order to load troops or to take off prisoners of war or rotational troops."

Now, obviously the things I have mentioned in general affect the loading the unloading of the cars, particularly since the General himself testified that freight is handled directly from the car into the ship, and manifestly too, the railroads could not have performed that service at their ordinary operating convenience or in any other manner.

The sixth point to which I want to direct your attention is this:

It was not practical for the individual railroads to load and unload cars of freight on the Army base piers.

Asked, "Do you think it will be practicable for the various individual railroads to undertake to handle their own freight separately," General Kilpatrick stated:

"But that would be an almost impossible operating condition."

"Q. You have to have the whole operation under one supervision and control, do you not?"

"A. That is desirable."

Now, finally, General Kilpatrick testified that cars could not be handled by the railroads at their own convenience. His testimony was as follows:

"Q. Would it be a satisfactory operation if the railroad personnel should unload these cars at their convenience and in the way they, from an operating standpoint, wanted to do it?

"A. No. They would have to unload them in such a way that we could keep our ships moving.

"Q. In other words, the unloading would have to be done according to your schedule to meet your need?

"A. Yes.

"Q. And it could not be done at the railroad's convenience?

"A. No."

Commr. ALLDREDGE. Mr. Reynolds, do you think—well, I assume you do and I would like to know why—do you think that the principles that are announced in these Terminal charges cases to which you refer would apply in a situation involving a transfer of freight from rail to shipside?

Mr. REYNOLDS. Well, Mr. Commissioner, I cannot see any difference in principle between transferring freight from an Army base to shipside and placing freight within an industry.

Commr. ALLDREDGE. Well, you spoke of the railroads being able to do that work at their ordinary convenience.

Mr. REYNOLDS. Ordinary operating convenience. Those are the Commission's words.

Commr. ALLDREDGE. Now, in the case of transfer from rail to ship it has got to be an adjustment of the conveniences of the ship and the rail; isn't it?

Mr. REYNOLDS. Well, on that—

Commr. ALLDREDGE. You could not transfer unless the ship was there, and if for any reason the ship was delayed you would be delayed?

Mr. REYNOLDS. That is right.

Commr. ALLDREDGE. And if for any reason the ship had to shift from one pier to another that would upset your adjustment; wouldn't it?

Mr. REYNOLDS. Well, it might, but still the railroads would be in control of the situation. They could handle the freight at their convenience.

Commr. ALLDREDGE. Well, they would have to consider the convenience of the ship; wouldn't they? The ship operator?

Mr. REYNOLDS. Well, certainly not to

Commr. AITCHISON. Would you have to do more than put it within the reach of their tackle, whether they have a tackle or not.

Mr. REYNOLDS. That is all we have to do, is put it in reach of ship's tackle. If I may say just one word, and I will close, the Army here, according to their own counsel, are claiming allowances of the shipper. Now, we think that the Interstate Commerce Act and equity both require that all shippers be treated alike, the government included.

Commr. ALLDREDGE. That is something else. I was
614 not asking you about that.

Mr. REYNOLDS. I did not mean to be answering your question. I was just concluding your argument. I thought I had answered it. At least, Commissioner Aitchison answered it for me when he said that all the railroads are required to do ordinarily is to place freight within reach of ship's tackle.

Commr. ALLDREDGE. Well, yes, ship's tackle. If it is not working?

Mr. REYNOLDS. Well, that is not our funeral.

Commr. ALLDREDGE. It might get to the end of the pile and have to wait a while; mightn't it?

Mr. REYNOLDS. Well, I think we could penalize the ship for that.

Well, the point I am making is this, and the point I want to leave with you is this:

That the government is here claiming as a shipper, according to its own counsel, and it should be treated as an ordinary shipper, and it seems to me too clear for any question that if it were the ordinary you would deny its claim for allowances; and I think you should do so here.

Thank you.

Commr. SPLAWN. Before you sit down, Mr. Reynolds, may I ask about the operation of that belt line? Did they send that engine back into your yards to get the cars

615 or did they have yards of their own to which you delivered the cars before they touched them?

Mr. REYNOLDS. The belt line had a yard of its own in Brechter, Virginia, a suburb of Norfolk, several miles from the base and over on the other side of the river. That was the belt line's classification yard. Well, now, they moved cars through that yard on orders of the Army to a storage yard just inside of the base, and that yard inside of the base, the storage yard, was on base property and under control of the Army since the Army controlled the entire base.

Well, now after the cars got to the storage yard, they were placed on tracks designated by the Army, and then when the Army wanted those cars on piers or on different parts of the yard, it would use engines that operate inside of the base exclusively to move those cars from the storage yards either to the piers or to places in the yards where they wanted them.

Now, the belt line contributed one angle. The Army had three or four, but the belt line had one. It furnished two crews. It contributed that to the Army. The Army controlled the crews in how they worked and where they worked anyway, and they worked under the direction of the Army.

Commr. SPLAWN. Now, that yard to which you delivered cars, the belt line then came to that yard and got the

616 cars, isn't that right?

Mr. REYNOLDS. I am sort of confused about which yard you have in mind, Mr. Commissioner.

Commr. SPLAWN. The one you spoke of first as being the yard of the belt line to which you delivered your cars.

Mr. REYNOLDS. Yes, sir. The belt line moves the cars from its classification yard with its own power and its own crew to the Army base and places them on the storage yards in the base on the tracks specified by the Army.

Commr. SPLAWN. That is where you delivered your cars, was to the belt line's own yard, that is, your lines, the lines of different roads?

Mr. REYNOLDS. A line haul carrier delivered its freight to the belt, either to its classification yard or at some point beyond its classification yard. The belt line moved the cars from its classification yard to the storage yard within the base.

Thank you.

Commr. ALLDREDGE. Mr. Reynolds, did you quote from the Commission's holdings in the Terminal Charges Cases with approval?

Mr. Reynolds. Yes, I did. I do not know whether that makes much difference, but I did.

Chairman Barnard. Mr. Winn.

Argument of Arthur L. Winn, Jr.

617 Mr. Winn. May it please the Commission, I appear for the North Atlantic Ports, which were intervenors in this proceeding and offered evidence. These North Atlantic Ports were represented by the following associations and agencies: Baltimore Association of Commerce, the Chamber of Commerce and Board of Trade of Philadelphia, Norfolk Ports Traffic Commission, the Port of New York Authority; the Richmond Chamber of Commerce, and the State Port Authority of Virginia.

The report of Division 2 described the position of the North Atlantic Ports as neutral. That is correct. These ports intervened and participated in this proceeding not because they wished to see the case decided in favor of the complainant or in favor of the defendants. They are both powerful and good friends. These ports have taken part in the case in order to safeguard the important port differential freight adjustment from disruption and to have the shipside rates continue to be published as one-factor rates as they have been for 50 years.

The issues presented by the complaint involved the possibility of a finding and an order under which shipside rates to and from Norfolk might be required to be published as line-haul rates and separately as terminal charges.

Now, these ports, the North Atlantic ports, are united on a common front in their view that any such finding or order would threaten disruption of the long-stand-

618 ing and very important port differential adjustment.

These ports unanimously opposed any such solution of the issues presented by this complaint. They filed a joint brief and opposition to the proposal, and they presented a joint oral argument before Division 2 against any separation of line-haul and terminal factors.

This separation between the line-haul and terminal charges I wish to put in a proper light.

It should be said that the government does not press or emphasize that issue. The issue is included in the complaint along with other prayers, apparently on the theory that it originally somehow strengthened the complaint. Actually the government introduced new evidence directed to this issue, and then the oral argument before Division 2 did not even mention it.

Now, this morning Mr. MacGuineas did mention it in a way that gratifies us. He mentioned it as saying that the government, because of the Commission's decision, the decision in the wharfage case, 157 ICC, that they appreciate the gravity and the seriousness of any separation in this highly competitive North Atlantic adjustment.

Now, any possibility of an order of this Commission requiring the separation of terminal and line-haul charges at one of the competitive North Atlantic Ports is of grave concern to each port and all of them, and they intro-
610 duced in this case affirmative evidence showing the undesirability and harm of any such action. I should add that this evidence against separation is the only evidence in the case on that question.

The central issue in this proceeding is whether the defendant railroads have been discharged from their responsibility to make delivery at shipside at the Army bases at Norfolk. The government states that the railroads have such an obligation. Defendants say in substance that if they have such an obligation they have been discharged by the government's action in taking over control and operation of the piers.

The North Atlantic Ports are not concerned with that issue. We do not think your consideration should be beyond that issue. If you find that the defendant railroads have been discharged from their obligation to make shipside delivery, that disposes of the complaint and it should be dismissed.

On the other hand, if you find that the railroads have not been discharged, we feel that you should limit your findings and conclusions to the duty of the railroads to perform the work, either performing the work or paying an allowance in lieu thereof, leaving to the railroads, as you must under the law as I understand it, the election to substitute an allowance for doing the work.

620 Now, if this view of the law is correct it would seem that the Commission should never reach the issue of requiring a separate statement of terminal and line-haul charges. If the Commission must leave to the carriers the decision whether to perform the work themselves or pay an allowance themselves in lieu thereof; any further alternative to the paying of an allowance should, we believe, be left to them, and any requirement to separate the charges into line-haul factors and terminal factors is a further alternative to the payment of an allowance or the performing of the work, all within the discretion of the carrier.

The highly competitive character of the readjustment through the several North Atlantic Ports is well known. The port differential adjustment is based on one-factor rates which include both terminal and line-haul services and apply to terminal and shipside. The present port differential adjustment has resulted from decades of port and rail competition for more water-borne commerce, and it certainly should not be disturbed. It certainly should not be disturbed except upon the most careful consideration and based on an extensive record examining at length the results which would flow from any such change.

As I have said, the government offered no evidence on such issue, and the only evidence of the record bearing on this is the evidence introduced by the ports against it.

621 Mr. ATCHISON. Now, has that evidence shown as has been contended here today that the practice of making delivery applied only to railroad owned piers or to those owned by public wharfingers?

Mr. WINN. No. It went beyond that, Mr. Commissioner. It left that to the railroads and the United States. Our evidence as to separation showed the line-haul rates between the various North Atlantic Ports, showed that the line-haul rates were below the domestic level, that they were on a comparative level with Baltimore, Baltimore being lower than New York. It showed that any reduction of the line-haul rates at Norfolk with any separate charges would give Norfolk a lower line-haul rate. The evidence also showed that if you had varying terminal charges at each of the North Atlantic ports you could never stabilize, hold within bounds, the competition of those North Atlantic ports, and you would have the terminal charges varying from port to port in a competitive struggle, and our conclusion was, and the expert evidence was that you could never again get stability in the North Atlantic ports until you reestablished one-factor rates.

Commr. ATCHISON. Now, were those one-factor rates applicable to private piers as well as those which are railroad owned or owned by wharfingers?

622 Mr. WINN. The one-factor rates apply whether you take advantage of the railroads offer to perform the service or whether you decline it and prefer to do it some other way. You have the same export rates applying.

Commr. ATCHISON. I should think this could be answered "yes" or "no."

Mr. WINN. Well, perhaps I do not understand it well enough to answer it that simply.

Commr. ARTCHISON. Does your testimony show that the one-factor rates to these other ports customarily apply not alone to railroad owned piers or wharves owned by wharfingers but also to private facilities and piers?

Mr. WINN. The one-factor rates apply to all export traffic.

Commr. ARTCHISON. Regardless of the character of the ownership?

Mr. WINN. Yes, regardless of the ownership and regardless whether you call on the carriers to perform all of the service that they are willing to render or whether you do not ask them to do it all.

Commr. ARTCHISON. Well, I did not ask you anything about that.

Mr. WINN. All right, I will try again. The export one-factor rates apply on all export traffic which meets the requirement of the tariffs.

623 Commr. ARTCHISON. As Judge Katy used to say out in Council Bluffs, your answer is just as simple as the law of fixtures.

Mr. WINN. Any separation of terminal charges at Norfolk with corresponding reduction or changes in the line-haul rates would either give Norfolk an advantage in line-haul rates or, because of the competition of other ports, spread to the other North Atlantic Ports.

In either case the results would be to destroy the separate port differential adjustment. The separation would make it impossible to maintain a stability between the total ship-side charges as between the competitive ports. Each port would naturally seek to gain a competitive advantage by reducing its separately stated terminal charges. Should any port thus seek to obtain a competitive advantage, other ports would for self-protection be required to enter the competitive race by changes in their terminal charges or in their line-haul rates.

It is doubtful whether stability could be restored following such a competitive rate cutting until properly related one-factor rates were reestablished.

The port of Philadelphia, as well as the ports of Baltimore and New York, would consider any reduction in the present line-haul rates to Norfolk to be detrimental to them and unduly preferential of Norfolk; conversely, Norfolk would consider the addition of terminal charges to

624 the present line-haul rates to that port to subject Norfolk to prejudice.

Commr. Aitchison. Well, I asked you whether or not these rates would apply to all three of these different kinds of facilities and you answered me saying they would apply wherever export rates applied. I will try again. Would the export rates apply when the delivery was made at a private wharf or pier?

Mr. Winn. Mr. Commissioner—

Commr. Aitchison. I am not talking about Norfolk or this case. I am talking about the ones that you have said had been disturbed.

Mr. Winn. Well, Mr. Commissioner, I have just been saved. I just glanced at a rate expert and he tells me, yes, they would apply; they would apply.

Commr. Alldredge. You mean the shipside rates would aply?

Mr. Winn. Yes, they would apply.

Commr. Alldredge. I mean shipside export rates. Would they apply?

Mr. Cousins. There is not any such thing, Mr. Commissioner.

Mr. Winn. Mr. Commissioner, if you interpret the private handling—

Commr. Alldredge. I do not understand what the answer was. You said, "There is not any such thing." No
625 such what?

Mr. Cousins. We do not publish anything called shipside export rates. We publish export rates.

Commr. Alldredge. For shipside?

Mr. Cousins. No, we publish export rates, and if these services are granted they have got to be covered by special tariffs of the port lines. The export rates themselves do not carry any such service with them. You have got to get a port tariff published only by the port lines that says what they will slip in under the covered rates. It is a free service just as closely as you can come to a free service.

Commr. Alldredge. You mean that your line-haul tariffs do not publish shipside rates? Is that what you mean?

Mr. Cousins. We do not use the word "shipside" ourselves.

Commr. Alldredge. You do not use it at all?

Mr. Cousins. We say we will deliver within reach of ship's tackle in certain cases, if you mean that, yes.

Commr. Alldredge. Is that a shipside rate, to use a common term?

Mr. Cousins. I think it is, yes.

Commr. Alldredge. Well, now, to come back to the proposition, what I injected to ask, was if that kind of a rate would apply if the shipments were consigned to private terminals.

626 Mr. Cousins. The answer to that is "yes," if there is a direct interchange so that the railroad delivers direct to the vessel; "no" if the shipper intervenes and takes possession.

Mr. Winn. The trick of it, Mr. Commissioner, is that if a private owner of goods takes possession of his property the railroad contract of transportation is terminated and you cannot thereafter ask a railroad to handle your shipments on up to the ship's tackle. If you have intervened as a shipper before that traffic gets to the ship's tackle, the railroads are through.

Commr. Alldredge. Well, I hate to interfere, but I think I understand what Commr. Aitchison is trying to find out, and I am interested in it too. There is such a thing as a pier being operated by a private owner; isn't there?

Mr. Winn. Yes, sir.

Mr. Alldredge. He does not have to own the freight that comes over it; does he?

Mr. Winn. No. There are possibilities.

Commr. Alldredge. Well, now, do those so-called shipside rates apply in the case of a privately owned and privately operated terminal?

Mr. Winn. On freight not owned by such terminal operated?

Commr. Alldredge. Yes.

Mr. Winn. I must defer to the people who know the
627 tariffs, Mr. Commissioner.

Chairman Barnard. Your time is consumed.

Mr. Winn. May I just call attention, with your indulgence, to the decision of this Commission in Wharfage Charges at Atlantic and Gulf Ports, 157 ICC 633, where you had under consideration a separation down in the southern ports. The Commission recognized that such an important question should not be decided in a case except where all of the ports were parties and where all of the ports had a chance to adduce evidence, and after you had done that, brought them all in, you decided against it.

Thank you kindly.

REBUTTAL ARGUMENT OF DONALD B. MACGUINEAS

Mr. MACGUINEAS. I should like to point out to the Commission that our complaint very specifically brought to the attention of the carriers and the Commission our position that it was the refusal of the carriers to perform their obligation to handle this freight, moving under shipside rates of which we complained that they refused either to handle it or to pay us an allowance in lieu of handling it, and that has been our position throughout the case. We are entitled to one or the other. We have gotten neither. Division 2 has given us one.

Chairman BARNARD. The reason you did not get one was your own fault. You would not permit the service
628 to be rendered, and you just got the other one; that is all.

Mr. MACGUINEAS. I think the finding of Division 2 to the contrary on that issue is well supported by the evidence.

I should like to refer a minute to the actual handling of traffic at these base piers, as to which I think there has been a good deal of confusion. The fact is—and I reiterate this very strongly—that the belt line handles cars from its yard onto the piers. It has done it since the Army took over and, to the best of my belief, it is doing it today, and it did that very same thing for the 20 years prior to the time when the Army took over. It is true that Army locomotives also move freight from the yards, the storage yards, back of the piers onto the piers, and that was pursuant to the arrangement about which I previously spoke.

When this pier was operated by the terminal operators, the evidence indicated that the terminal operator had an engine which it used to supplement the belt line engines in bringing the cars off of the piers so that the Army with respect to the bringing of cars on the piers has stepped into the shoes of the terminal operator, and under both private operation and under Army operation the belt line has always considered that its tariff obligation where they are handling shipside rate meant bringing the car
629 out to the pier and unloading that car on the pier floor. As I stated before, anything else would be meaningless. You could not have a shipside rate unless it did that.

Commr. MULLER. Well, did the belt line ever take any cars out of the Army's storage tracks to the pier?

Mr. MACGUINEAS. Oh, yes.

Commr. MILLER. Or did it take it direct from its yards to the piers?

Mr. MACGUINEAS. No. As I understand the evidence, all cars went from the belt line into the Army storage tracks back of the piers.

Commr. MILLER. Always?

Mr. MACGUINEAS. That is my impression, but the belt line also used this engine, which the carriers have ingeniously described as a contribution, to bring those cars right onto the pier.

Commr. MILLER. I am not talking about that engine. I am talking about the belt line locomotives that took the cars from the belt line storage tracks to the Army tracks.

Mr. MACGUINEAS. Well, I think it is probably so.

Commr. MILLER. Did they ever, then, take that same locomotive from the Army tracks to the piers?

Mr. MACGUINEAS. Now, whether the same locomotive was used, I am not perpared to state, but a belt line locomotive, yes, sir.

Commr. MILLER. Not the one they donated, but any others?

Mr. MACGUINEAS. Well, that is the one they used.

Commr. MILLER. Well, I am not talking about that. They gave that to the Army. I am talking about any of the others.

Mr. MACGUINEAS. The point is they say they gave it, and we say they supplied it in recognition of their obligation to place those cars onto the piers as part of their shipside obligation.

Commr. MILLER. I am not asking that. Well, you knew what the question was.

Mr. MACGUINEAS. Yes.

Commr. MILLER. Your answer was, as I understand it, that the belt line locomotives other than the one they donated did not take any cars from the Army storage to the pier?

Mr. MACGUINEAS. I think the only testimony on that was that the man in the belt line testified to his knowledge he did not know at least of any instance of a direct movement from the belt line classification yard onto the pier. That is the only testimony on that point. We produced a witness—

Mr. COUSINS. He did not say anything about what he knew. He said, "No, they don't," on page 201.

Chairman BARNARD. Don't interrupt the gentleman in his argument.

Mr. MacGuineas. We produced a gentleman who
631 had been in the export shipping business in the port of Norfolk for 20 years, and he testified for the last 20 years that on this base pier in connection with his business every other week or so, at least every other month—and he testified that the handling of those cars by the belt line to the pier was exactly the same under the period of Army operation as it had been for 20 years previously: that he himself had many times been held up getting onto the pier while he watched a belt line locomotive bringing those cars right onto the pier track.

Commr. Porter. Well, but those orders were under the exclusive direction of the Army; weren't they? They were moved under the Army's orders; weren't they?

Mr. MacGuineas. Yes. The guard master so called was an Army employee. Obviously, when you are dealing with a facility of this sort whose function it is to change rail traffic to water traffic, you must have coordination in the handling of the traffic, both rail and water, and you effect that coordination through a yard master, but there is no indication that the yard master under Army operation handled anything any differently than the man who had handled that under the private operation for the Transport, Trading and Terminal Corporation. Let me make it clear that never once did the carriers complain that there was anything inconvenient about the way they brought
632 their cars onto the pier tracks, so it seems to me that fact alone disposes of Mr. Reynolds' argument about convenience.

In so far as movement of the cars is concerned, the belt line did move the cars onto the track. We had no complaint as to that, and they have never indicated in the slightest that that was in any way inconvenient to them.

Commr. Alldredge. Was the belt line a defendant?

Mr. MacGuineas. That is correct.

Commr. Rogers. The Norfolk and Western has already paid this?

Mr. MacGuineas. Yes.

Commr. Rogers. How much was it?

Mr. MacGuineas. It was between $850,000 and $900,000 that the Norfolk and Western has already paid in.

Commr. Splawn. May I ask you a question that was not clear in my own mind that appeared from my question of Mr. Reynolds? These lines, did they perform any more service by reason of the Army taking over this belt line terminal activity, or was the service of the Virginian and these other lines just the same so far as pulling their cars into Norfolk were concerned as before the war?

Mr. MacGuineas. We say it was exactly the same. You are now considering movement of car as distinguished from unloading a car.

Commr. Splawn. Yes.

633 Mr. MacGuineas. As far as movement of car to pier is concerned, we say it is exactly the same under Army control as it was under Transport, Trading and Terminal Control.

Commr. Porter. I am just wondering when the Norfolk and Western made that payment that you speak of $850,000.

Mr. MacGuineas. They paid that in January, 1945.

Commr. Porter. After all, the government made at least half of that; didn't they?

Mr. MacGuineas. I would not deny that there was in the minds of the Norfolk and Western a knowledge of the excess profits tax law. But may I point out that their obligations go beyond their 1945 obligations? It is accruing today, so that was not their sole motivation.

Commr. Aldredge. Have you read the decision of Division 3 in the Minnesota Transfer Case?

Mr. MacGuineas. No, I regret that I am not in a position, your Honor, to discuss that case now.

Commr. Aldredge. Well, it injects itself in the middle of this one, the holding does, holding in effect—I think it is up for reconsideration—that in a case somewhat like this where there was a belt line to perform the service the belt line was a common carrier, it was responsible for all the allowances, and so forth, and not the line-haul carrier.

Mr. MacGuineas. That brings me to a point which was not made clear by Mr. Cousins. He says that the

634 trunk lines do not publish a shipside tariff. Well, that is literally true. What they do is to publish a line-haul rate to Norfolk, but they also provide that they will absorb the charges of the terminal operator by reference to the terminal, that is to say, the belt line road tariff, so that in effect what the Pennsylvania and the other carriers say to a shipper is this:

"At these piers in Norfolk, the terminal operator charges you 1 cent per hundred pounds for wharfage and 3 cents per hundred pounds to unload your export freight. We, the line-haul carrier, will absorb those charges of 1 and 3 cents in the line-haul rates."

They tell the shipper that he will get that service for the line-haul rate.

If there are no further questions, I have concluded.

REBUTTAL ARGUMENT OF BENJAMIN J. BROOKS

Mr. BROOKS. In the argument advanced by the defendants, there are several points that I would like to hurriedly cover.

Chairman BARNARD. Yes, you will have to do it hurriedly.

Mr. BROOKS. Remember, Mr. Chairman, I am a friend of the Court in this matter.

Chairman BARNARD. Well, we make no difference whether you are a friend of the Court.

Mr. BROOKS. They state that export rates contain
635 one factor to cover wharfage and handling, but they certainly knew when they established those export rates that wharfage and handling would be performed under those rates.

Now, they talk about a concession to the Army in permitting export rates to be applicable through Army bases. That was not a concession. That was done because of a war time necessity. They designated the Army bases and Navy bases as terminals through which the export traffic might move, and that was done before the Army took over its base, the piers at Norfolk, and when they did take over the tariff should have been amended to make an allowance to the carriers.

Now, on the question of unreasonableness of rates, the only evidence on that score was put in by the defendants, and they show that from Central Territory the export rates to Norfolk are the same as the export rates to Baltimore. Well, that is something that has been in effect for lo these many years, even older than I am, my gray hair and all, and that is something that is voluntarily established.

The Commission, the Supreme Court, and all have held that one of the best tests for reasonableness of rates is rates that have been voluntarily established and maintained over a period of years.

Commr. AITCHISON. Did you speak yourself correctly
636 when you said that the carriers ought to put a tariff in providing for an allowance to the carriers?

Mr. BROOKS. To the government, I should have said, your Honor.

Commr. MAHAFFIE. Mr. Brooks, wouldn't the government have a claim, on your theory, for this switching service that is furnished with these four engines that is furnished on this yard?

Mr. BROOKS. In my brief, your Honor, I think that they might very well come in and ask for an allowance for such service.

Commr. MAHAFFIE. Wouldn't that allowance have equal merit as the claim of unloading?

Mr. BROOKS. I think so. I am not thoroughly conversant on that, but that thought did occur to me in my study of the case.

Now, on this question of private piers, you speak of no allowances to any other shipper and that the unloading is only over designated piers. Now, your Honors, in these questions of private piers, like the Weyerhaeuser case, you very specifically said that the railroad's pier facilities were adequate. That is the question here. The railroads are not in a position to adequately render the service so they are not then entitled to the wharfage and handling. You permitted them to continue in 157 ICC, in the Wharfage case, you permitted them to continue single-factor
637 rates but with the understanding that they have adequate facilities.

Chairman BARNARD. This cause is submitted and taken under advisement and the Commission stands adjourned.

(Whereupon, at 12:20 p. m., the case was submitted and the Commission adjourned.)

BEFORE THE INTERSTATE COMMERCE COMMISSION

DOCKET NO. 29117

In the Matter of
UNITED STATES OF AMERICA

vs.

ABERDEEN AND ROCKFISH R. R. Co., *et al.*

639 *Reporter's Transcript of Oral Argument.*

Hearing Room "B"
Interstate Commerce Commission Building
Washington, D. C.

Wednesday, November 6, 1946

The above-entitled matter came on for oral argument before the Commission at 10:00 o'clock a. m.

PRESENT

Commissioner AITCHISON, (Chairman), LEE, MAHAFFIE, MILLER, SPLAWN, ROGERS, ALLDREDGE and PATTERSON.

APPEARANCES.

CHARLES P. REYNOLDS, 1110 Shoreham Building, Washington, D. C., appearing for Southern Canners, defendants.

ARTHUR L. WINN, JR., Investment Building, Washington, D. C., appearing for State Port Authority of Virginia, Rich-

mond Chamber of Commerce, Baltimore Chamber of Commerce, Chamber of Commerce and Board of Trade of Philadelphia, Norfolk Port Traffic Commission, Port of New York Authority.

Benjamin J. Brooks, Cedar Lane, Sleepy Hollow, Falls Church, Virginia, appearing as *amicus curiae*.

Windsor F. Cousins, 1740 Broad Street Station Building, Philadelphia, Pennsylvania, appearing for Defendants.

Donald B. MacGuineas, Department of Justice, Washington, D. C., appearing for complainant.

640 PROCEEDINGS

Commr. Aitchison. We shall now hear oral argument in the matter of United States of America versus the Aberdeen and Rockfish Railroad Company, *et al.*, docket No. 29117.

ARGUMENT OF DONALD B. MACGUINEAS.

Mr. MacGuineas. May it please the Commission.

This case, as we see it, essentially involves a single issue as to whether the railroads which move traffic through the Port of Norfolk over the so-called Army base piers, are entitled to keep, out of their line haul rates, a factor of 4 cents per hundred pounds as the terminal charges for wharfage and handling on export and import traffic moving over the Army base piers. Although, since June 15, 1942, when the Army, because of the necessities of the war, took possession of the piers—

I say that although since that date, the carriers have refused to perform the wharfage and the handling services at those piers, at the present stage of the case, five members of the Commission have decided that the carriers may retain that money, that they need not perform the service and that they may charge the full line haul rate and that they need not pay the government any allowance for its performance of that service. Four members of the Commission held to the contrary.

I shall confine my argument this morning to a few
641 of the specific propositions which are stated in the report of the Commission which seem to me clearly erroneous and which have been decisive in the decision of the Commission.

The first point I should like to mention is the question of the placement of the cars. Mr. Cousins has very astutely magnified that into a major issue in the case. As I see it, it is really not an issue in this case at all.

The Army has no complaint about the service which the carrier are and also have been rendering at the Army base piers with respect to placement of cars on the piers; and as far as the government has heard or the record in this case discloses, the railroads have never had any complaint about that.

The fact is that before the Army took over those piers when they were then operated by the "Transport Trading and Terminal Corporation", a public terminal operator, that it was the practice of the carriers, through the belt line, which is the carrier which serves the piers, to move cars into the Berkley yards of the Virginia Railway and then into the Army base, and at tracks which lie back of the piers themselves, to then use a switch engine to bring those cars on to the actual Army base piers along the tracks which run through the center of each pier.

That was the practice before the Army took over, and so testified to by the witness for the Belt line. That has been the practice since the Army took over, contrary to the impression which the Commission seems to have received.

642 The witness for the Belt line testified that the same switch engine which the Belt line now uses to bring the cars onto the pier was used by the Belt line for the same purpose before the Army took over the piers.

Commr. PATTERSON. What is the situation now with respect to the operation of the pier?

MR. MACGUINEAS. I have been informed by the Army and the Maritime Commission that the present status of the pier is the following. As of May 31st of this year, the Army declared these piers surplus. Half of each pier has been turned back to the administration of the "Maritime Commission". At the present time the Maritime Commission has an operating agreement with a private terminal operator called the "Hampton Roads Terminal Incorporated", by which that operator runs the piers for the account of the Maritime Commission.

The Maritime Commission has advertised for the lease of the piers to a terminal operator, and therefore may be said to be in process of putting the piers back into precisely the condition, or the mode of operation which prevailed before the Army took them over in 1942.

Commr. PATTERSON. Would the Maritime Commission at the present time permit the railroads to place the cars on the piers?

Mr. MacGuineas. I am unable to give the Commission specific information as to that. I have not attempted to re-try the case in any sense to bring into the record additional facts.

643 Commr. Patterson. Well, as a matter of information I would like to know what the present status is.

Mr. MacGuineas. I just am unable to state that because I have not been informed by the Commission.

I would assume, from the fact that the Army has released the piers, that no substantial amount of Army traffic is now moving over the piers, so that the issue is no longer one for future operation.

Commr. Patterson. Then it is just a question of reparations, now?

Mr. Brooks. Pardon me, Mr. MacGuineas, if I may be pardoned for interrupting for just a half minute, I find—Brooks is my name,. I will argue a little later. I find in supplement 84 to the Norfolk and Portsmouth Belt Line Railroad Company Tariff, ICC No. 105, effective July 3, 1946, that the Hampton Roads Terminals, Incorporated, has been substituted in the tariff for the Transport Trading and Terminal Corporation, so that, according to that tariff, since on the 3d of July, this new Corporation, Hampton Roads Terminal, Incorporated; had been functioning there as an agent of the railroads to handle traffic over the Army base piers.

Commr. Patterson. That would restore the status to what it was before the Army took over.

Mr. Brooks. That is correct.

Mr. MacGuineas. That has been my assumption
644 but I would not speak of that as a fact since it is not in the record and I have no personal knowledge of it.

If I may return a minute to this question of placing the cars:

As we see it, the railroads, with respect to placing the cars on the pier, have exactly the same obligations under the tariffs, under Army operation, as they had under "Transport Trading and Terminal" operation, and they have recognized that by performing exactly the same function; to wit, actually placing the cars with Belt Line Engines onto the piers.

Now, the Commission seems to have diverged from the facts, if I may put it that way, because of the arrangement which was made between the Commandant of the Army

base, and the carriers at the time the Commandant took over.

It will be recalled that there is a substantial volume of traffic moving over these base piers which does not move under the so-called ship-side rates. Now, as to that, of course, the Army has never contended that the carriers had any obligation to make a ship-side placement.

So as to that traffic, the Army has always recognized its obligation to move that traffic onto the piers.

Obviously, it was unfeasible and uneconomical to have each car which comes to the Army base segregated with respect to handling onto the pier between the Belt Line and the Army, and to have the Belt Line handle only the ship-side cars and the Army handle the non-ship-side cars.

645 So, as a practical arrangement, the Belt Line and the Commandant said, "We'll just pool our resources here, and you use your engine and we'll use our engine discriminately and between us we will move everything onto the piers as the occasion arises." That is what happened. That is the testimony of the Commandant in the record of the case.

Now that is not by any means any derogation of the obligation of the carriers to place onto the piers that traffic which moves under the ship-side rates. Although the Commission characterized that situation as a contribution of the engines by the Belt Line, there is no evidentiary basis whatever for such a conclusion. No witness for the carriers ever contended that they were doing that as an eleemosynary institution. They were doing it because that was their obligation under the ship-side tariffs and had been so for 20 years, and they merely continued to do what they had been doing subject to this practical arrangement with the Army.

Commr. Patterson. Is it true that the Commandant would not permit the locomotive of the carriers to proceed onto the piers.

Mr. MacGuineas. Oh, far from it. The Belt Line switch engine did come onto the piers and has always come onto the piers during Army operation.

Commr. Patterson. And delivered these particular cars?

Mr. MacGuineas. Certainly. Placed the cars right on the pier. That is my point.

645A Commr. Patterson. At ship-side?

Mr. MacGuineas. Surely.

Commr. Patterson. If they placed the cars, why did you want the pay for placing the cars?

Mr. MacGuineas. We did not ask that. Our complaint does not go at all, as I endeavor to make clear, to the matter of placement of the cars. Our complaint goes to wharfage charges and the unloading of the cars which are at the pier; to unload from car to pier floor at the ship-side berth, as the phrase has it.

That is all we are asking for. It is that we be compensated for the performance of that service which we perforce had to perform because the carriers would not do it as soon as the Army took over.

I think your questions emphasize the irrelevance of this so-called placement issue. Nevertheless it seems to be one of the factors which influenced the Commission in reaching its last report in this case. The Commission, in its report, made another statement which apparently it considered important and that was this "the wharfage and handling at the defendants' public commercial piers or transportation provided by them for the shippers, providing a wharf and handling the freight at the complainants' piers are not transportation, but merely facilities provided and work done by a shipper for himself on his own property, at his own convenience and expense, before or after the
646 transportation is performed."

Now I respectfully submit that when that statement is analyzed with respect to the facts of this case, it is a little short of astonishment.

We have here a physical act: one, bringing the car from the yard back of the piers onto the pier. The second physical act is unloading that car onto the floor of the pier to provide reasonable access to the ship's berth.

I say it must be that that act either is or is not transportation. Whether it is or is not transportation, certainly cannot depend upon whether, in a given situation at a given time, that act is performed by the carrier or by the shipper, and yet that is exactly what the Commission seems to have said, that because the shipper did it here, it therefore becomes not transportation, but when the carrier does it, it is transportation. But the very question in the case, is whether the carrier's refusal to do it is not a breach of its obligation to provide the transportation which it contracted to perform by its tariffs.

Fortunately, that question has been specifically decided in a very recent opinion by the Supreme Court which the Commission did not see fit to refer to in its report.

I refer to the case of the Railroad Retirement Board versus Duquesne Company in 326 US 446, that is the coverage

under the Railroad Retirement Act, of a warehouse
646A which was on the line of the Pennsylvania and performed the service of loading cars from the Pennsylvania track onto its warehouse and their storing freight.

The Supreme Court specifically adopted the definition of transportation under the Interstate Commerce Act as controlling in this case, so there can be no question that this decision is a construction of the meaning of transportation under the Interstate Commerce Act.

May I with the permission of the Commission read briefly from what the Supreme Court said in refutation of precisely the issue advanced by Duquesne Warehouse in that case, which was the precise issue which seems to be stated in the Commission's report in this case:

The Supreme Court stated as follows: "We have noted the loading and unloading services rendered by Duquesne. The duty of unloading carload freight ordinarily rests with the shipper or consignee, but it is a transportation service within the meaning of the Interstate Commerce Act. Its cost may be included in the line haul tariffs or separately fixed or allowed as an additional charge.

"Duquesne's answer is that the service of loading and unloading is done by it for its customers, that these services are rendered before railroad transportation has begun, or after it has ended."

That is precisely the statement made by the Com-
647 mission in this case.

"That they are not and cannot be a part of railroad transportation since the tariff or the Pennsylvania forbids it from performing the services."

In this case, the charges for loading and unloading were required to be paid by the shipper.

The Supreme Court continues: "The question, however, is not, whether in these cases, the service of loading and unloading is being rendered by the Pennsylvania and is therefore in fact a part of its transportation, it is, when a carrier's affiliate is performing a service that could be performed by the carrier and charged for under the line haul tariffs. If it is such a service it is a transportation service within the meaning of the present act."

Then the Court concludes by saying: "It is sufficient for the disposition of these cases that the loading and unloading services performed by Duquesne are services performed in connection with the transportation of property by railroad."

Now, as I apply that case to the Norfolk situation, it is this: there can be no question that the railroads may properly include in their tariffs, the performance of wharfage and handling at Atlantic Coast terminals. They have done that very thing for more than fifty years. They have done it specifically over the Army base piers at Norfolk ever since the end of the first world war.

648 We do not have in this case at all; a question as to whether, if the carriers' tariffs had never provided for ship-side service, whether they could be compelled to render it. The fact is, their tariffs did provide for ship-side delivery, and that property; therefore, became a part of their transportation obligation, and it is their failure to live up to that obligation about which the government complains in this case.

Another statement is made in the Commission's report which seems to me surprising, to say the least, and that is this: "the complainant could have had its traffic handled at the defendant's expense, if it had used the defendant's piers and had been willing to accept the service the defendant was able to provide."

Now, surely the Commission did not mean to say that under the circumstances that prevailed at the port of Norfolk, during the war, when without dispute in this case, not more than approximately one-third of the traffic which moved over the Army base piers could conceivably have been handled over the two railroad-operated piers at that port. Surely, the Commission did not mean to say that under those circumstances the government should have routed all of that vital wharfage over the two railroad piers, knowing full well that those piers were utterly inadequate to handle that traffic, and that that was the only right of the government under the circumstances of this case.

We must recognize that the Army base piers at
649 Norfolk are a necessary and vital facility at that port for the interchange of rail-water traffic. The carriers themselves have recognized it for more than 20 years, for they themselves have voluntarily used those base piers as a major point for interchanging rail and water traffic. Certainly when the war increases the necessary traffic moving through that port, the necessity for using those piers increases rather than decreases, and certainly the Army and this Commission I am confident will not say that the Army should have been relegated to the position of using the railroad piers which were hopelessly inadequate to carry the traffic.

With respect to the fact that the tariffs of the carriers continued for varying periods of time—and some of them still continue,—to show transport trading and terminal corporation as the operator of the Army base piers at which they agree to absorb the wharfage and handling charges, the Commission dismissed that fact as an oversight by the carriers.

I do not think the record in this case supports that conclusion. The fact is that ever since 1921 when a series of different terminal operators has operated the facilities at the Army base piers, the carriers have never been concerned to see that their tariff named at a particular time the particular operator of that facility.

There has been in some cases a time lag of years before the carriers changed their tariffs to show the particular operator who happened to be operating the facility.

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That seems to us to show that our interpretation of those tariffs is correct, that what the carriers meant when they published ship-side tariffs and mentioned in varying language, "Transport and Terminal Corporation," they were talking about these piers, and in effect they were telling the shippers, "if your freight, traveling under a ship-side rate moves over those piers, we, the carriers will absorb the terminal charges for wharfage and handling."

The same thing is true when the Army took over the piers. As far as a tariff representation is concerned, we say, and we think it is justified by the entire past course of conduct of the carriers at this port that those tariffs continued to hold out, that the carriers would absorb the handling charges at that port. Nevertheless, the carriers flatly repudiated that tariff obligation as soon as the Army took over. The Army necessarily took over that obligation itself, but having done so and having performed a part of the carriers transportation obligation, made so by their own tariffs, the Army, as a shipper, is entitled to a reasonably fair allowance for the performance of that obligation of the carriers. That is the basis of our case.

I think there has been some confusion at various stages with respect to the position of the Army as a terminal operator. The Army has never contended that as a terminal operator it could compel the carriers to hire it to perform these services. It is as a shipper that the Army is entitled to the reparations which it is claiming in this case, because, as I said, it has been compelled to perform the obligation which the carriers have repudiated.

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Commr. Patterson: The carriers refused to perform this wharfage service?

Mr. MacGuineas: That is right.

There is dispute in the record and disagreement among the Commissioners as to the facts in that connection.

The last report of the Commission, the majority of the Commission took the position that the carriers could not do it, that the carrier performance of that obligation was out of the question, under Army operation of the pier.

We contended that that conclusion, as a matter of fact, is quite unsound. The Commandant testified, and there was no contradiction of this, that he was willing to permit the carriers to bring their own civilian labor force onto the piers, and to perform the unloading service, subject only to requirements of investigating the personnel against sabotage, security and that sort of thing.

We say that on this record the conclusion should be made that the Army did permit the carriers to do that—would have permitted them to do it, had the carriers evidenced at any stage the slightest inclination to perform their tariff obligation. On the contrary, from the day the Army took over, the carrier seized upon that as an excuse to get out of performing that tariff obligation and never made the slightest effort to do so, never made a single request to be permitted to perform their tariff obligation under Army operation of the pier.

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Commr. Mahaffie. Was there anything in writing either way as to that obligation at that time?

Mr. MacGuineas. There is, as plaintiff's exhibit 1 in the case, a series of letters which passed back and forth between various officials of the Army and various of the carrier's. Various of the carrier's demands and refusals.

It is true that the initial statement of the Commandant of the port was that he requested an allowance but before this suit was filed, that he specifically requested performance of service, and we have always taken the position in this case, that the carriers have the option either to perform or give us an allowance. That we are willing and have been willing that they exercise that option. They, however, have seen fit to do neither, neither to perform nor give the allowance.

Commr. Mahaffie. When the allowance was originally requested, was there any discussion of performance by the carrier in lieu of an allowance?

Mr. MacGuineas. Yes. In other words, the correspondence in effect made a demand for performance or allowance. Is that the Commissioner's question?

Commr. Mahaffie. That is my question, yes,
653 whether the matter of actual performance was discussed in those documents?

Mr. MacGuineas. Yes. Yes, it was.

Commr. Aitchison. Mr. Brooks.

Argument of Benjamin J. Brooks

Mr. Brooks. I think your honors understand that at the present time this case has resolved itself into one involving reparation, only.

The issue, as stated in a couple of these dissenting opinions in the last report are as follows; Commissioner Alldridge stated, "the issue in this proceeding is, after all, a simple one prior to 1942, wharfage and handling between carriers and ships at the particular piers involved were provided by private interests, and the charges therefore, totaling 4 cents per 100 pounds, were absorbed by the defendants. This practice, together with other circumstances shown of record, establishes the fact that the line-haul rates of the defendant's were made in contemplation of the absorption by them of these terminal charges.

"On June 15, 1942, the United States Army found it advisable, or necessary, on account of the exigencies of war, to take over these terminal facilities and to perform the services, but defendants continued to exact the same line-haul rates that applied when they absorbed the charges of their terminal agent."

Commissioner Splawn puts it this way: "During the war emergency it was necessary in the public interest for
654 the Army to take over those facilities and to perform the work heretofore performed by the terminal company. The responsibility of the defendants under their published tariffs was therefore discharged in substantially the same manner by the Army as heretofore by the terminal company.

"The issue here is whether the Army should receive the 4 cents for the facility it supplied and the work it has done in place of the terminal company, or, whether the defendant railroads serving Norfolk should be permitted to retain it."

"As things have worked out, and under the majority report, the Army is penalized for acting in the public interest, as well as, if you please, in the interests of the defendants, by making it pay twice for the port services; once in the established ship-rates, which were single factor ship-side

rates, including wharfage and handling, as well as the line haul transportation. And again—they paid once in the single factor ship-side rate, and again by providing the wharfage and handling itself.

Now, it is only under unusual circumstances that the railroads perform loading and unloading services on carload traffic. They do it on live stock and certain other instances, but as a general rule the shipper performs those services.

As stated at sheet 4 of the report, "It is not the legal duty or practice of the carriers to perform handling services on carload freight, except in unusual circumstances, such as
livestock or freight that is to be trans-shipped by the
655 railroads or their agents."

Now, at the north Atlantic ports, it has been a practice for years and years and years of publishing these single factor, ship-side rates, and observing on water borne traffic, the certain fixed port differentials. Taking New York as a basis, Philadelphia is 2 cents under New York, and Baltimore, Norfolk, Newport News, 3 cents under New York. In other words, to maintain those fixed port differentials and for the benefit of the shipping public and foreign buyers or sellers, the practice grew up and has been maintained for years and years, of publishing the single factor ship-side rates under which the railroads hold themselves out to perform and to furnishing the wharfage facilities and to perform the loading and unloading services.

There was a case back in 157, ICC, 20 years or so ago. 157, ICC 663, decided September 30, 1929, in which proceedings, the question of separation of the terminal charges from the line-haul rates was up for consideration. Certain interests wanted to have the terminal charges published separately at Norfolk, Philadelphia, Baltimore, and the other ports.

The Commission, in its consideration of this case, made mention of the fact that I have just stated about these single factor ship-side rates, and that the rates to and from Norfolk, or Newport News on the "C&O" maintained by the
"N&W&TC&O" include wharfage and handling be-
656 tween wharfage and ship-side rate. The rates to and from Norfolk maintained by other southern carriers do not as a rule include the port services to and from ship-side."

So that from southern point, as a general rule, the wharfage and handling charges are published separately, so that the shipper would pay the line-haul rate to the carriers.

and then if he used the services of the carriers for the wharfage and handling, he would pay for that. If he provided his own services, he did not pay it. But because of this situation, at the north Atlantic ports, the railroads held themselves out to furnish that service.

The Commission, at page 685 of its report stated "whether a rail carrier may be required to turn traffic over to a municipal or private competing facility at a port and absorb the port charges of the facility to which the traffic is delivered when the railroad itself has provided facility to accommodate traffic, is the question here presented. The carrier has the right to perform to itself, any transportation service which the carrier may lawfully be required to perform."

And going on, "the railroads may make such rules, and so forth, so as to retain the traffic to their own facilities, and prevent their competitors from taking their business away from them.

The rail carriers at the north Atlantic ports select the rail-water facilities that are to be used in connection
657 with ship-side rates—this is quoting from the Commission's report at 686—"and should a shipper insist upon the use of facilities other than those selected by those carriers, he would be required to pay once for the port services in the established ship-side rates, and again for the services performed by the municipal or private facility."

Here, there is absolutely no question of requiring the rail carriers to turn the traffic over to a municipal or private competing facility and absorb the port charges of the facility, because here the railroads have selected the rail-water facilities to be used in connection with the ship-side rates.

And with respect to the Army base piers, they made this selection when they published, because of wartime conditions, and that is important, wartime conditions, the railroads published the tariff provision which provide for the application of export rates on shipments consigned to the U. S. Government and handled through Army and Navy bases for export to foreign countries.

At Norfolk this had the effect of adding the Army base piers, on January 15, 1942, to the list of railroad and public commercial piers over which the railroads had previously restricted the inclusion of wharfage and handling charges in their transportation rates.

The carriers, when the Army took over its piers at Norfolk, should at that time, on their own initiative, have pub-

lished the necessary tariff provisions or issued a
658 section 22 quotation to take care of the situation and either make a deduction from their single factor ship-side rate, or to make the government an allowance of the 4 cents—

Commr. AITCHISON. Did you say the Army should have done that?

Mr. BROOKS. The railroads should have done that on their own initiative.

Now, the Army base piers are in no sense of the word, private piers. They are piers that have been used ever since their construction, finished just after the first world war. They have been used by the railroads or by the agents of the railroads as probably the principal facilities over which water-borne traffic was handled at Norfolk. Now they have gone back and are again being used by the railroads and their agents to handle water-borne traffic.

Section 68 of the Act, it seems to me, plays a prominent part in this case. The railroads have played particular stress on *ex parte* 104, The Terminal-Switching Allowance cases.

Those cases involved switching or spotting service at industries, and the question as to when the service under the line-haul rate was completed was involved there, while here, wharfage and handling at a port are involved, and the rates specifically included wharfage and handling. But even and if the principles of *ex parte* 104 Terminal Allowance cases were pertinent to the issues in the normal wharfage
659 and handling case, are not pertinent here, because, acting under the provision of section 68 of the Interstate Commerce Act, the railroads provided for the use of Army bases in connection with the movement of export traffic and as the handling of the traffic at the Norfolk Army base could best be handled by the Army, section 68 required the railroads to permit the Army to perform such handling. Questions involving pooling of services, railroad convenience, and election of industry to perform services are therefore not involved here.

Now, the railroads talk about that special tariff provision by which the Army and Navy bases were included in the facilities over which water-borne traffic might be handled, or the export traffic of the government, as being a concession to the government.

That was in no sense a concession, it was a war-time necessity, and definitely so.

As I stated a bit ago, the railroad should have provided for an allowance to the government for providing wharfage and handling. Export rates have not really been made applicable through the Army base at Norfolk because no tariff amendment was made to cover the wharfage and handling at that base.

The law does not require the carriers to supply wharfage and handling on water-borne traffic. That was the concession to the carriers at the north Atlantic ports, permitting them to hold out the facilities, to publish these single
660 factor ship-side rates, and to furnish the wharfage facilities and to perform the handling. That was the concession to the railroads.

However, that concession, of course, would be subject to the provision of the act, such as section 68, under which the carriers are required to adopt "every means within their control to facilitate and expedite military traffic."

Now, the carriers did that and they did a swell job in moving the war-time traffic. They did a good job at the Hampton Roads Port of Embarkation, but they are holding to the 4 cent per 100 pounds that should have been turned over to the government.

Your honors, it is definitely a case there of unjust enrichment.

Now, what happened right across the way, across the roads there at Newport News, the government took over the "C&O's" piers there, took over the "C&O's" men and all, and the "C&O" paid them. C&O furnished the wharfage facilities, but the C&O paid an allowance to the government for performing the handling services and that allowance came out of the very same rates that the carriers over at Norfolk, other than the Norfolk and Western, are holding onto.

Commr. MAHAFFIE. Was that allowance under a tariff or section 22?

Mr. BROOKS. It would be under a section 22 quotation, under a contract they had with the government.

661 And a similar allowance made at Boston under identically the same circumstances as obtain at Norfolk, allowance for wharfage and handling.

Then the Norfolk and Western, right at Norfolk, what did they do? They have paid the major portion of the money that they collected on this 4 cents per 100 pounds for wharfage and handling. As stated by Commissioner Splawn in his dissenting opinion, "In the light of such

conditions, one of the principal defendants"—that is, N & W — "has conceded justness and reasonableness the defendant's claim to the extent recognized in the original findings and has made settlement accordingly."

Commr. MAHAFFIE. The net cost of the settlement was somewhat diminished, was it not?

Mr. BROOKS. That may well be true, your honor.

However, going back before they collected any of the money and when negotiations were being carried on between the Army and the carriers, they took it up first with the Belt Line and then with the Norfolk and Western. It seemed to kind of take the lead on the part of the carriers.

In a letter which appears at page 4 of exhibit 1 in the case, Mr. O. W. Cox, General Traffic Manager of the Norfolk and Western Railway, wrote a letter to Lt. Col. C. R. Lasher, reading in part as follows: "If only government freight is handled, it seems to us that it would be proper to
662 provide for wharfage and handling allowances in all instances where the rates are so published as to apply to or for ship-side. That is, where they include wharfage and handling."

The government very definitely is entitled to 100% reparations for the entire period.

I will save the balance of my time for rebuttal.

Commr. AITCHISON. Mr. Cousins.

ARGUMENT OF WINDSOR F. COUSINS

Commr. AITCHISON. You have agreed with Mr. Reynolds on a division of time?

Mr. COUSINS. Yes.

If the Commission please, this case was decided on May 3d, by a 6 to 4 vote, and we would not be here today, of course, except for a very unfortunate situation within the Commission.

I am not going to take much time to argue the case this morning. This will be the third time I have made this speech. I think our minds are all made up. As the Commission sits this morning, it is entirely divided, 4 to 4, according to the records heretofore.

The importance of this case, is reparations only, as has been said, because the Army is no longer operating the piers at Norfolk and has not been for some time.

To the railroads, the prime important thing now, as in the beginning, is the principle involved.

Commr. Aitchison. Why is there any principle in-
663 volved when it is within your power to make a tariff that is perfectly clear, and put it up to us that way?

Mr. Cousins. The principles that are involved, if the Commission please, depends upon whether the Commission will require, as the complainant requests, something to be done in this case, which is not authorized by any tariff, has never been in any tariff, about which there is no question in any tariff, and which has been upheld and required time and again by the Commission.

The precise question is whether the railroads will be required to expand their port practices beyond anything that has ever been done before, and that is to increase their accessorial services, and to give a large additional amount of free services to shippers of water-borne traffic.

If that should be the result of this proceeding—and that is the thing we have feared from the beginning—it would be contrary to everything the Commission has done before in cases of this character.

The significant question is whether the railroads shall be required to pay allowances to a shipper for unloading his own freight on his own pier, plus the question which has been slurred over by the government from the beginning, right up to this morning, which does not seem to me to be recognized in the dissenting opinions of the Commission, with any clarity, plus the question as to whether the
664 railroads shall be obliged to pay an allowance for the use of the piers. That is, per rental. That is wharfage, which the Army has provided for its own convenience.

Now, I want to discuss that a little bit under three points.

The first point is that the railroads do not and never have, along the Atlantic coast here, unloaded water-borne traffic on private piers. All up and down the Atlantic coast, as the record shows, are numerous private piers, including more than a dozen in Norfolk which are named in the record, which shippers maintain and operate to handle their own water-borne freight for their own convenience.

It must be assumed that there is some advantage to shippers to providing facilities of that character, otherwise they wouldn't do it.

The late Commissioner Eastman referred to that once in a case and said that obviously there was an advantage to a shipper, and in that case it was the Dutton Lumber Company, in having its own piers, controlling its own freight, and keeping other shippers off.

When they have the advantage of their own piers, the railroads have never gone on those piers and unloaded freight from cars or vice versa from the pier into the cars.

Commr. SPLAWN. You never went on these piers before the war and you do not propose to use them after the war?

Mr. COUSINS. Are you asking me that?

665 Commr. SPLAWN. Yes.

Mr. COUSINS. Of course we have been on these piers.

Commr. SPLAWN. Under the terms of the tariff?

Mr. COUSINS. Yes.

Commr. SPLAWN. You have paid for the unloading and loading?

Mr. COUSINS. Yes, which was entirely consistent with all of our practices, because they were a public railroad terminal and we performed the services which for 50 years we have been accustomed to perform, because the piers were our terminal. When the Army stepped in and took them away from us and made them an Army terminal for the use of Army freight, then they were no longer a railroad terminal. The Army was not our agent. We had no obligation to unload. However, that is the whole case and I would like to take that up in a little more detail.

Commr. SPLAWN. If you can convince me of that thesis, I have no interest in this thing other than seeing that the right thing is done under the law.

Mr. COUSINS. I will endeavor to do that, Mr. Commissioner.

Commr. SPLAWN. And I know that is true of any Commissioner here. You said we were evenly divided. I think we are all sitting here judiciously and listening to you with great interest to see if we have misunderstood you heretofore.

Mr. COUSINS. I will refer in a moment, Mr. Splawn, to one or two findings in your opinion, as to which I

666 will try to convince you there is some error involved.

All up and down the coast, there are not only the private piers of the kind I have been talking about, but there are permanent Army and Navy bases. I understand that the permanent Navy base at Norfolk only a short distance from these piers handled a great deal more freight during the war than this Army base. Whether that it true or not, it is a tremendous operation. The railroads have never gone on that base and unloaded freight from cars, although they did during this war publish the special tariff

provision making the export rates apply through that base like all other Army and Navy bases.

The difficulty with the complainant's case here is that the Army wants both sets of advantages in operating its own pier. The ordinary shipper must take the ordinary disadvantages along with the advantages. The disadvantages are he looses the free railroad service. He has to take it. The Army wants both. It wanted to run the job, handle its own freight and still get the advantage of operating over the pier as if it were a railroad pier as it had been in the past.

Now, my second point: Turning from the first point, which was that the railroads never have performed a service on private piers, my second point is that in no event do the railroads pay allowances for this sort of thing. That is something we have never held ourselves out to do. We have always exercised our right to perform the work,
667 and in this case we had no alternative.

That point has been argued and there is only one way you can decide it and that is to read the record. If you read the testimony of the Commandant, General Kilpatrick, in this case, and then come to any conclusion other than the fact that the railroad could not have performed the work to the satisfaction of the Army, within any reasonable standard of convenience to themselves, or consistent with any usual standards, then my point is wrong, but I am not going to argue that at length. All I am going to say is this: the Army makes it clear that the Army never expected the railroads to perform the service. They announced from the beginning when they took over the piers, that they, the Army, would perform all of the services.

That is in the record.

The Army operated negotiations with the railroads asking for allowances. Week after week and month after week, it asked for allowances. Mr. MacGuineas answered Commissioner Mahaffie this morning, yes, that they did connect up with that demand of service.

When the negotiations had proceeded for the length of one year, after they started, during all of which time only allowances were sought, then at the end of the year, we did get a letter saying that as a prerequisite to the filing of this complaint, they were demanding service.

Now, the correspondence is all in the record. Of
668 course, if that is the kind of demand for service that gives the railroads their legal alternative, there it is,

but it requires some twisting to get that into the form of an alternative. In the formal complaint there was a request for money payment and not for service. That is on the record. The record shows the railroads could not have performed, by the admission of the General, at their convenience, that they could not have performed with railroad labor according to the Army needs, and in either event they could not have performed, except by pooling their services.

Now, there is some little question in this case as there has been, I think, in the last argument, from the beginning, as to whether we had a question of reasonable convenience in this case when we came to serve a pier.

I believe one of the Commissioners suggest that when a railroad shifts cars back and forth on a pier, it is obliged to meet the convenience of the vessel, too, as in any form of interchange, and, of course, that is correct. On a terminal where you are interchanging with a vessel, but on a terminal where you are delivering to a shipper 2 miles short of the piers and do not get any closer than that to the vessel, then the usual considerations of railroad convenience do come into play, in my opinion.

Now, my third point—

669 Commr. AITCHISON. Do not the same considerations with respect to the necessity of conforming to the rights of others apply when you switch through city streets, or conform to business usages and things of that sort?

Mr. COUSINS. That is right, Mr. Commissioner, that is perfectly true. However, I am going to mention in a moment, with respect to the *ex parte* 104 principles, there is no interpretation of anybody, so far as I know, of the *ex parte* 104 rules and principles which go beyond this point: that when the industry, in this case the Army, designates the interchange tracks upon which its cars shall be placed, and directs the railroads where and when to place the cars, and that is done, I say that ends the transportation service and I do not believe anybody ever contends that you need go beyond that, or from the standpoint of the bench that the railroads may be permitted to go beyond that.

However, I have not finished my last point under the usual situation that I was developing at the point and that is this, it is the thing that has been blurred over from the beginning to the end and Mr. MacGuineas hop-skipped and jumped it this morning, as he has from the beginning.

We are talking about 4 cents allowance in this case, one cent of which is for wharfage. That is more than 1 fourth

of the reparations, because some of the traffic was in open-top cars, which would only be subject to the 1 cent and not the 3, so we are running into an important part of
670 the case here. Here was a facility that the railroads had been using for 20 years for the interchange of freight with vessels.

The Army ceased the facility and took it away from the railroad agent.

Now, for what is it to be paid, pier rental or wharfage, after having done that? Mr. MacGuineas said the railroads had an alternative. What alternative? To construct another pier, to try to duplicate it there on the spot and say to the Army, "Don't use the one you have taken away from us, come over and use the other." What was our alternative with respect to the 1 cent? Where can there be any question about that?

Now, I want to say something to Mr. Commissioner Splawn on that point: he says in his dissenting opinion, "The finding that the plaintiff could have had his traffic handled at defendant's expense if it had used defendant's piers is contrary to the evidence, which show that only about 37 per cent of the traffic which moved over complainant's piers in 1943 could have been handled over defendant's piers."

I assume that what the Commissioner meant in a majority opinion was that if the Army had seen fit to leave the railroad terminal in its control, it could have had its traffic handled there as in the past. I do not suppose the majority meant to say that after the Army seized the facilities it could have still used the railroads. If that makes a case, the Army slipped up a little bit in leaving 37
671 per cent of the facilities there. If the Army had just seized them all, so we had nothing, then they would have a clear cut case for showing we could not perform our obligation. However, they only seized one.

And bear this in mind, as Commissioner Splawn says, he says the remaining facilities were only adequate to handle 37 per cent but since the complainant shows that the Army had concentrated 10 times the normal traffic in Norfolk, that 37 per cent was still 3.7 times as much pier as we needed to handle normal traffic.

Now, how much pier facilities are railroad obliged to furnish in any event? I say none. None whatever.

Commr. SPLAWN. Was there anything here that required you during the war to furnish any more than you did?

Mr. COUSINS. No, sir. No, sir. Especially not after the government took what we had.

Commr. SPLAWN. Was the traffic handled any differently during the war, so far as you are concerned, the line-haul carriers—up to the point of interchange at the terminal from what it had been handled before the war?

Mr. COUSINS. Not so far as I know. Not as effects this case. Of course, there were difficulties in operation, haste and all that sort of thing, but as effects this case, no.

Commr. SPLAWN. The effect of the government seizing these piers was then merely to substitute its own service beyond the point of interchange for your agent?

672 Mr. COUSINS. Yes, Mr. Commissioner, but "merely" is a big word in that sentence. Not "merely" to substitute its services, but to change the operation and handle things at its own convenience in its own way, in an unusual way, and not as a public wharfinger does business.

Commr. SPLAWN. That part of it merely had the effect of increasing your business, did it not, that moved on those tariffs?

Mr. COUSINS. Our business to Norfolk was greatly increased, yes.

Commr. SPLAWN. And so far as loading at ship-side is concerned, it was done satisfactorily to the line-haul carriers?

Mr. COUSINS. No, sir. Neither satisfactorily or unsatisfactorily. It was no concern of ours whatever. We were not there. I do not see the grounds for the dissent, if that is what your Honor has in mind.

I just want to say one more word about this wharfage allowance: what that meant was this: The railroads hired this pier, to an extent, from the terminal operator, heretofore the public wharfinger, and paid him a pier rent for the use of it and measured that rent by the amount of railroad freight handled and paid them 1 cent a 100 pounds, or 20 cents a ton. That is what that was. It was no different whatever than what it would have been if we had lumped the amount together and paid them $20 thousand a year.

673 The government seized the pier, took it away from us and then said, "Now, we want you to pay us rent". Why we should pay the 1 cent would be most difficult for the government to prove.

Commr. ROGERS. In your line-haul rate you were charging the government that 1 cent, it would not be reasonable for you to keep the compensation and not pay them either, would it?

Mr. COUSINS. That comes under reasonableness of rates. The question is whether the railroads are unjustifiably enriched. If there is anything that bothers the minority in this case, I believe that is the question. That is what I get out of it. That is the government's real case here, that is Mr. Brooks' case, and that I think we ought to meet, because as Commissioner Splawn says, on the surface, the railroads appear to have performed less service and yet to have received the same revenue.

Now first just let me say that there is nothing unique about that sort of situation. That is the result of all of your *ex parte* 104 cases. When you get to the point where a shipper has to perform his own plant switching for himself that the railroad did for him before, he still pays the line-haul rate.

Commr. ROGERS. I do not agree that that is on the basis of 104.

Mr. COUSINS. I am only talking about the principal of 104. I say that when a carrier is relieved from plant switching, because of interference of the shipper or the desire of the shipper to perform himself, or for any other reason, when the carrier is relieved, it then performs less service
674 for the same line-haul rates. I am only saying that there is a comparable situation where you might say the railroads are unjustifiably enriched.

Commr. ROGERS. You have from there to find out how far your line-haul rate went in your 104 proceedings.

Mr. COUSINS. Certainly.

Commr. ROGERS. There is no doubt in this case how far your line-haul rate went.

Mr. COUSINS. The situation is the same in both situations. What I am trying to say, Mr. Commissioner Rogers, is that whatever the cause of cutting off a railroad delivery service in an industry, short of the final place that the car is going, and there are various things that come up to cut off that railroad service and put the service on the shipper himself. Whatever the cause is—and it has nothing whatever to do at the moment with this case—the railroads still get the same line-haul rates although they perform less service than they would otherwise perform if they did not encounter some interference or some desire of the shipper and so forth.

Now that is one situation.

In all of the wharfage cases similar to this one, such as the Weyerhaeuser case, the result has been the same.

Wherever the Commission has held that the railroads were not obligated to unload cars, as in this case, they have performed less service for the same line-haul rates than
675 they do for the shipper who get his freight unloaded.

Now it is the same in the case of a shipper who has export freight. If he does not bring himself within the export rules, he must pay the domestic rates. These things follow, because of the rules of the game. Therefore I say it is not unusual if we find in this case, for some good reason, that the Army was not entitled to this service, and yet the railroads kept the whole revenue, there is nothing startling about it. I do not think the Commission would be at all concerned about it if we had a shipper as plaintiff here instead of the government.

Now, the answer is that the rates paid by the government were not unreasonable from any standpoint. Despite the fact that other shippers, including the government, could have secured more service under the same rates. Of course, the government did so at the other ports by using the public piers.

The export rates which the government paid here, and which apply at all the ports on a related basis, included no factor, and never included any factor for this unloading service, or the pier rental. That is, the wharfage.

Let me read again what Mr. Commissioner Alldridge said in his decision, "This practice together with other circumstances shown of record establishes the fact that the line-haul rates of the defendant's were made in contemplation of the absorption by them of these terminal charges."

Now, if the Commission please, if that means that
676 there is something in the export rates, some element, so much money in them that would not be there if we did not have this established practice of unloading freight, if that is what the Commissioner's statement means, it is 100 per cent wrong, because there can be no dispute on this record that nothing was ever added to the line-haul rates, the export rates we are dealing with here, to include the port service and to cover the port service of the local port lines rendered. The line-haul carriers don't even participate in it.

Commr. Alldridge. You mean by that, I guess, that the record does not show that the line-haul rate was broken down in all of its elements to show what was included? Is that what you mean?

Mr. Cousins. I mean I can demonstrate there is no factor in them, yes.

Commr. ALLDRIDGE. In other words to demonstrate them, you would have to break it down and take it up to determine what elements of cost were specifically put together to make the line-haul rate, is that right?

Mr. COUSINS. I do not think so, and for reasons which I will show you.

Commr. ALLDRIDGE. How can you say, then, that if this line-haul rate had taken care of those services for a long number of years, those services, then, were not included in that lump sum line-haul rate?

677 Mr. COUSINS. That is what I propose to show you.

Commr. ALLDRIDGE. I would like to see it.

Mr. COUSINS. I will show you from several different approaches and there is nothing contrary in the record.

One approach is that the line-haul carriers which make the rates do not have anything to do with this service, do not know anything about it and do not participate in it. Under the same line-haul rates, sometimes the local port roads grant the service and sometimes they don't. And yet, the same line-haul rates apply.

Commr. ALLDRIDGE. Do you mean to tell me, that in making these line-haul rates to that port, those who have responsibility for doing that, did not know what port services would be involved. Is that what you mean to say.

Mr. COUSINS. Practically speaking, yes. I do not mean to say that the railroad rate makers are so stupid that they do not know what the practices are, but I mean to say they paid no attention to it with regard to these rates and actually did not know what the differences were, one port from another, because they are different.

Let me tell you how the rates were made.

Commr. ALLDRIDGE. Is that how line-haul rates are made here?

Mr. COUSINS. Let me tell you how they are made. It is perfectly clear, everybody knows the answer. The Commission prescribed, some 15 years ago, more or less,

678 new class rates in official territory, and when they did so, it threw the old port rates and differences out of kilter.

Mr. Brooks a few minutes ago described to you how the import and export rates were made, but what he told you has not been good for some 15 years because we had to change it when the class rate case was decided.

Here is what happened: The railroads adopted the prescribed domestic Baltimore class rates and published the same export rates.

Commr. ALLDRIDGE. Now when they did that, are we going to assume that they did not think they would include, and still be reasonable, all the terminal costs incident to the export service?

Mr. COUSINS. They have to cover the cost, of course. Technically they are in there.

Commr. ALLDRIDGE. And we to assume that when that act of adopting them for that purpose, the men who did that did not know that those expenses would come in there? there?

Mr. COUSINS. They knew that they would be in, of course, but they took your domestic rate, which does not involve any unloading of cars—

Commr. ALLDRIDGE. Regardless of what the mechanics of the procedure was, they had to register final judgment about the reasonableness of those rates for that service, did they not?

679 Mr. COUSINS. Yes, but I am only trying to show you, Mr. Commissioner, that nothing was put into the rates because export rates involve unloading and domestic rates do not.

Otherwise if they were going to take the unloading and wharfage services into account, it may be presumed that they would have added something because certainly the domestic rates that you prescribed included no element for that kinds of service that is not given on domestic traffic.

Commr. ALLDRIDGE. Did not the same rate specifically include a rate for picking up and unloading less than carload traffic, but when you assume that obligation under those rates, did not your responsible officers assume that those would be reasonable for the added service?

Mr. COUSINS. Technically, they have to be. Otherwise the service would be a free service uncompensated. Substantially that is what it is. But of course when the local lines published what they have at the ports, they have to do it in this way. Unless they are going to charge extra, they have to say, "the line-haul rates will cover".

We are talking about unreasonableness. The point is that the rates were never inflated to cover this and therefore they are not intrinsically unreasonable when they don't get the service. And many export commodities have moved that do not get unloading service. Lumber doesn't and it goes the same level of export and import rate. Tank cars don't. All the great quantities of freight moving through the private piers, and the permanent

680

Army and Navy bases do not get the service, and yet they get the same rate.

Furthermore—this is my last point on that because I really should take no more of Reynolds' time.

Mr. REYNOLDS. Go ahead.

Mr. COUSINS. When all that is said and done, the record shows with no question of doubt whatever, that the export rates the Army paid were depressed below a maximum reasonable level, so the Commission can not find that they are unreasonable.

Commr. AITCHISON. What depressed them?

Mr. COUSINS. Competition with Baltimore.

As your Honors well recall, you prescribed higher domestic rates to and from Norfolk than you did to and from Baltimore, but the Norfolk lines for competitive reasons, hold to the export and import rates at Norfolk, and at the sixth class level, that gives Norfolk rates 4 cents below what the other ports have, generally speaking—that is rough and ready—and there is no port on the Atlantic seaboard which has a similar situation of depressed rates, except Boston, which is at the other end.

Commr. AITCHISON. It was a financially profitable arrangement, was it, for the carriers serving Norfolk?

Mr. COUSINS. What was a profitable service?

Commr. AITCHISON. What they did in the adjustment of their rates.

681 Mr. COUSINS. Well, to the extent that it brings them business, yes.

Commr. AITCHISON. As compared to the carriers that served Baltimore?

Mr. COUSINS. That it is profitable? I do not know why it should be more profitable to haul freight longer distances.

Commr. AITCHISON. What is the financial condition of the two carriers?

Mr. COUSINS. You know full well it has nothing to do with export and import traffic. We are not talking about coal.

There is one thing.

Commr. AITCHISON. I don't know that. You say I do, but I don't.

Commr. ALLDRIDGE. I do not know it either. I thought all traffic handled, coal and everything else, entered into the picture.

Mr. COUSINS. I am not going to talk for the Norfolk Lines. I had the impression they were rich coal-carrying lines.

Commr. ALLDRIDGE. That would make lower rates on other commodities, would it not?

Mr. Cousins. These rates are competitive, if you please. They are certainly below any rates which this Commission would prescribe.

That is what I contend. I am not going to argue that point any longer, but let me add one more to it: The
682 Army was not entitled under usual rules to the export rates at all in this case. Its traffic could have taken domestic rates because it was delivered into the custody of the shipper. We got nowhere near a vessel. And by special tariff concession, published at the request of the Secretary of War and Navy, the railroads made the export rates applicable during the war through Army and Navy bases. They did not make the important or coastal and coastwise rates applicable, and they are not applicable, which shows it was a special situation and a concession. Otherwise, they would have paid the higher domestic rates which I say at the sixth class level are 4 cents a pound higher than what they did pay.

Commr. Miller. You say you made that by contract? It was a special rate?

Mr. Cousins. It was a special rate included in the tariffs.

Commr. Miller. Not contrary to the act?

Mr. Cousins. It would have been contrary to the act if it had been in anybody's favor except the government, certainly, sir. The railroads did not interchange with a vessel at this pier, and contrary to what Mr. MacGuineas says, the operation was not the same as it had been theretofore. We delivered 2 miles back of the pier, where, as, and when we were directed in writing to delivery by the Army, and from that point the Army disposed of its freight. It switched where it could. It stored the freight. It put
683 it onto vessels, it took some over and put it back in storage. It shipped some of it out of the terminal to some other point. It did what it wanted with its freight, and the railroads knew nothing about what was going on.

Now that was not similar to what had been done in peacetime when it was our terminal. Then we did shift cars all the way to the pier. Then we paid no attention to interference, either, if there was any, because it was our terminal. And questions of interference do not arise when they are the railroad's own pier and not interposed by a shipper.

Now, Mr. MacGuineas indulged in a flight of imagination with respect to the reasons for the Army switching its own freight on the pier, and he stated that there were large amounts of freight there that we had no obligation to shift,

or something to that effect. That is not in the record. If it is, I challenge Mr. MacGuineas to cite the page where any such thing shows.

He does cite in his printed documents, page 30, but they do not support the statement he made at all.

I am obliged to leave Mr. Reynolds the rest of the time, if the Commissioner please.

Commr. AITCHISON. Proceed, Mr. Reynolds:

ARGUMENT OF CHARLES P. REYNOLDS.

Mr. REYNOLDS. I am appearing on behalf of the southern carriers that serve the port of Norfolk.

On this question as to whether or not the railroads
684 have treated the Army fairly, I just want to quote you a sentence from the majority opinion in this case, as follows: "The majority say, 'If anything, the complainant is being favored, but of course this is not unlawful under the circumstances.'" Now, I think what Mr. Cousins has said shows that the government is being favored.

I also call your attention to the fact that a lot of the government's traffic was handled under Section 22, "at rates much less than the published rates".

Also, the fact that the railroads by special concession made the export rates applicable on government traffic, has resulted in the government paying rates in no instance higher than the domestic rates and in many instances lower than the domestic rates.

For example, the export rates on cigarettes and tobacco from important manufacturing points in North Carolina, is 16 cents for 100 pounds less than the domestic rates, and the government got the benefit of those.

Now, I want to devote the principle part of my argument to the proposition that transportation ended when the cars were delivered at the storage yard at the east end of the base, about 2 miles from the track and that from then on the traffic was handled by the government.

Commr. MILLER. You mean two miles from the pier?

Mr. REYNOLDS. Yes.

685 Commr. MILLER. You said track.

Mr. REYNOLDS. The storage yard was 2 miles from the pier.

From then on the government handled the traffic to suit its own conveniences, and under those circumstances, the railroads were not obligated to make any allowances for wharfage or handling.

In the first place, I call your attention to the fact that the government took this Army base for its own exclusive use. There is no question about that, and it is shown in a letter written by the War Department to one of the defendants about 2 months after the pier was taken over.

The letter read in part as follows: "The terminal property will be operated and controlled by the War Department. Use of the facilities by the other Armed Forces or by private concerns will be by the express permission of the War Department.

"It is intended to use the terminal facilities for government traffic only. However, circumstances may require the handling of commercial freight, and in either instance, the War Department or its agency will perform all services".

Now, that shows pretty clearly that the government neither specified nor intended to permit the railroads to perform any services on the pier.

As Mr. Cousins has pointed out, the government from the beginning asked an allowance and only an allowance, until, as a prerequisite, for the filing of this complaint, they
686 requested one of the defendants to perform some service.

Now, the fact that delivery took place at the storage yard is made clear by the following statement from the majority opinion which is supported absolutely by the evidence of record and the statement is as follows: "The Belt Line has a classification yard at Berkley, Virginia, across the river from Norfolk.

"Adjacent to the 2 piers and included in the Army base property there is a storage yard of about 500 cars capacity.

"Since the complainant took over the operation of the 2 piers, the Belt Line delivers and receives respectively, cars of outbound and inbound water traffic on this storage yard, on tracks designated by the complainant.

"The complainant thereupon takes possession of the shipments and controls movement of the cars beyond to the pier location."

Incidentially, it is also a fact that the Army instructed the Belt Line what cars to move from its Berkley yard before those cars ever were moved, and the cars were not moved until the Belt Line received instruction from the Army, just what cars to move.

Now, the fact that transportation ended with the placement of the cars in the storage yard is also shown by the

fact that the carriers could no have moved the cars to the piers and have unloaded them at their own convenience.

687 Moreover, the evidence clearly shows that the loading or unloading of the cars by the carriers would not have been satisfactory to the Army.

Those statements are proved by the testimony of General Kilpatrick, who was the Commandant of the Hampton Roads Port of Embarkation, which included the Army base at Norfolk.

I want to summarize briefly now the salient points of General Kilpatrick's testimony.

In the first place, the General testified that the Army base piers could not have operated under civilian direction.

He was asked this question, "In your opinion, why did the Army think it necessary to take over this pier instead of making use of the pier under the prior public operator?" And his answer was this: "That would not have been feasible at all, because the Army has to control the over-all operation, the bringing of the cars in, the allocation of ships, and so forth. It has to be Army operation. It can not work under civilian direction, I do not think".

Now, the second point in the testimony which I would like to direct your attention to is this: "The loading and unloading of the cars on the pier had to fit in with the operation of the bases as a whole."

The General was asked, "What is the difference between the operation of the piers now and what it was prior to 1942?" He answered: "The government controls the priorities of loading and the type of loading. It con-

688 trols the stevedores in how they work, and when they work. When they work over-time and when they work straight-time. The unloading has to fit in with the over-all picture. A civilian organization could not handle the freight from the depot into the ships. That is supervision that the Army has to furnish and a coordination that the Army has to furnish."

The third point is that the emergency of movement was paramount. Concise dates had to be met and the supply of civilian labor was inadequate.

General Kilpatrick's testimony on that point is as follows: "There are not in this vicinity of Norfolk civilian labor to do that job. It must be supplemented by Army labor. I mean to meet the peaks of the emergency with which we are faced. We have a convoy dead-line to meet and have to work day and night. In other words, the move-

ment is paramount, regardless of who does the work. We have to keep our freight moving, we have to load our ships and meet our convoy dates".

He also made the point that the Army had difficulty which commercial interests do not have, "with the big flow of freight coming in and with the uncertainty as to specific delivery dates, we have a difficulty which commercial interests do not have. We have to load our bottom cargo first, then filler cargo, and then on top of that blow-up cargo.

"As freight comes into the piers, we are sometimes in need of bottom cargo and have to hustle those cargoes right down to the piers and work them. Whereas other
689 cargo for the same ship, or for cargo loading later in the loading cycle, it may be in the port for several days."

Now, it is obvious, I think, that the matter of loading ships effects necessarily the matter of unloading cars and training traffic to go on those ships.

There is made clear also by General Kilpatrick's testimony, which shows that the Army unloaded the freight from the cars in its own peculiar way and to suit its own convenience.

That is, "Sometimes freight was unloaded direct from the car to the ships without touching the pier at all. Sometimes the freight was allowed to remain on the pier for some days. Or, it was reloaded into cars and taken back to the depot.

"Sometimes ships that were in process of loading were moved from the piering into the stream to make room for other ships".

As to that, General Kilpatrick, after emphasizing the necessity for Army control and supervision of the entire base, said this: "Everything, ships and everything, must be controlled by the government. Bear in mind we have embarkations and debarkations. We handle prisoners of war over these same piers at the same time. We even have to move a ship out into the stream that is loading cargo in order to load troops or to take off prisoners of war, or casualty troops.

"As a matter of fact, the carriers are under no obligation to unload cars, so that the ships may be unloaded in the manner in which they were at the Army base."

690 The carriers have no duty to take freight direct from the cars to the ships. Neither are they under a duty to re-load the car with freight that had been unloaded

from it and take that car back to the depot and their unloaded freight.

They are under no duty to interrupt the unloading of a car so that a ship can be moved and another ship put in its place.

In view of the way in which this pier was operated, it is obvious that the control and operation of the pier by the government was advantageous to it, in that the Army performed with its own labor, the extra services which it would have had to pay the railroad's agent to perform if that agent had been in control of the pier. For example, it would have had to pay the railroad's agent to reload the traffic in the car and take it back to the depot.

Commr. LEE. What do you mean by the depot?

Mr. REYNOLDS. That means warehouses in the base.

Commr. ALLDRIDGE. You mean depots.

Mr. REYNOLDS. However, the Army would have had to pay for these extra services which the pier performed by its own labor, and that labor, 50 per cent of it at least, was soldiers and Italian service units.

Now, General Kilpatrick's testimony also makes it plain that it was not practical for the individual railroads to load or unload cars of freight on the Army base piers, but the loading or unloading if it could have been performed
691 at all, would have had to be performed by pooling the service.

He was asked: "Do you think it will be practical for various individual railroads to undertake to handle their own freight separately?"

He answered, "That would be an almost impossible operating condition." "You have to have the whole operation under one supervision and control, do you not?" His answer was, "That is desirable."

Finally, the General testified that the cars could not be unloaded by the railroads at their own convenience.

He was asked: "Would it be a satisfactory operation if the railroad personnel should unload these cars at their convenience in the way they from an operating standpoint wanted to do it?" His answer was: "No, they would have to unload them in such a way that we could keep our ships moving."

He also adds: "The loading would have to be done according to your schedules to meet your needs?" "Yes." "And it could not be done at railroad convenience?" "No."

In line with the record here, a decision in favor of the

complainant would overrule the *ex parte* 104 cases, and the various cases dealing with port practices which the Commission has heretofore decided.

In effect, it would also compel the railroads to employ the Army as its agent, contrary to the Supreme Court's decision in the Santa Fé case, 232, US, 199, Atchison,
692 Topeka and Santa Fe Railway Company against US, 232, US, 199, where the Court said that any service that a railroad is obligated to perform, it has a right to perform itself.

Commr. AITCHISON. That has been pretty well shot during the war has it not?

Mr. REYNOLDS. I do not think so, no, sir.

Commr. AITCHISON. How about all the re-routing and things of that sort?

Mr. REYNOLDS. All the what?

Commr. AITCHISON. The re-routing that has been required under the emergency provisions of the Act? When directed by this Commission, you must turn traffic away and give it to somebody else.

Mr. REYNOLDS. Yes, that is true, but the Commission has never gone so far, that is to my knowledge, to say that the railroad must employ a certain agent. The railroad has a right to select its own agent to do what the railroads have to do.

A decision in favor of the government would also compel the railroads to accord the Army a preferred status and to pay the 4 cents a hundred pounds at rates that are depressed.

We therefore ask that the decision of the majority of the Commission be reaffirmed. Thank you.

Commr. AITCHISON. Mr. Winn?

693 ARGUMENT OF ARTHUR L. WINN, JR.

Mr. WINN. May it please the Commission: I appear for the North Atlantic Ports. They were represented in this proceeding by the following agencies which intervened and participated in the hearing: The State Port Authority of Virginia, The Richmond Chamber of Commerce, The Baltimore Association of Commerce, The Chamber of Commerce and Board of Trade of Philadelphia, the Norfolk Port Traffic Commission, and the Port of New York Authority.

Commr. MAHAFFIE. Is Richmond one of the North Atlantic Ports?

Mr. WINN. The intervenor and I had high hopes of using the James River for water-borne traffic.

Commr. MILLER. Water-borne traffic has always gone to Richmond.

Mr. WINN. Thank you for your help.

All of these ports, your honors, are neutral as to the primary issue in this case; namely whether the railroads should pay an allowance for certain wharfage and handling at Norfolk.

What they are concerned with is a secondary prayer under which your honors were asked to require a separation of the terminal and line-haul rates. That is to say, should require the railroads to publish the terminal charges and a lower, separate line-haul rate.

694 Had any such prayer been granted, you would have had a result which would have upset the entire port differential adjustment, which has been built up, and is the result of decades of port competition. That port competition has been bridled. It has been stabilized by the use of one-factor rates which cover the service from shipping point to ship-side. Once you get away from one-factor rates, you create inequalities, distortions in the rate structure, undue advantages there, and the result is you would undermine this important port differential adjustment.

Now, in all justice to the complainant, I should say that counsel for the government has throughout the case at no time emphasized this secondary prayer for a separation of the charges. I think they have been aware of the harm that might be involved in any such step.

I should emphasize too, that these ports not only intervened but participated and offered evidence showing the harm that would be done to the port differential adjustment if separation of terminal and line-haul charges should be ordered.

Now, your honors have considered the question of whether terminal charges should be separately published many times, and in exhaustive investigations where that was the issue, where all the evidence went to that, where all the thought, discussion and argument went to that question. You have unfortunately ruled against any such requirement.

Among the cases stated are "lighterage" cases
695 203, State of New Jersey versus Baltimore and Ohio, 245, and charges Atlantic and Gulf Ports. Now it is interesting that in 157 ICC, you had the U. S. Shipping Board, with a program to bring about a separation of termi-

nal and line-haul charges at the ports. You had several of the ports in favor of that program. You had an investigation embracing the southern ports where that was the issue, but because it was so important, you decided that you should not conclude the matter without bringing in all of the ports. It effected all of them, with the result you broadened the investigation to bring in the North Atlantic Ports. After a hearing with all the ports in and on the most careful consideration you ruled against a separation of charges.

Now, in this case the separation issue is only incidental and we think obviously. You should not, in a case where it has only incidental reference and the only evidence is against separation, you should not, in such a case, order separation.

Now we learn at the argument this morning, that so far as the future is concerned, this case is moot. I do not know that counsel for the government, Mr. MacGuineas, has made that as clear as he might have, and while it is against the rule to go outside the record in these ICC cases for facts upon which essential findings might be made, nevertheless, I think it is appropriate, natural and proper for your honors to go outside the record and look at your own tariffs to learn whether you have a case here for the future.

696 Let us assume that you know from your tariffs, such as Mr. Brooks has mentioned, that there is no issue here as to the future. I think it is incumbent upon you not to lay down an order for the future when you have no case which involves any issue for the future which is not moot.

Thank you, your honor.

REBUTTAL ARGUMENT OF DONALD B. MACGUINEAS.

Mr. MACGUINEAS. I would not want my silence to give any Commissioner the impression that I agree Mr. Reynolds statement of the testimony of General Kilpatrick, the Commandant of the port is a proper or accurate statement of what he testified. I must say I think it is a very distorted statement of the position of the General in this case.

Mr. REYNOLDS. Well, I quoted exactly what he said.

Mr. MACGUINEAS. But he failed to quote a great deal of what the General said, too. It will not do me any good at this stage, if the Commissioners think that is important, I only ask them to study the transcript.

My point is, when he was talking about operation, he was talking about the whole process of getting the freight onto the ship. Now, of course, the government had to control the movement of ships when German submarines were lurking

outside the port. Of course, the government had to decide whether explosives should be placed in the particular part of a ship or not, but that has nothing to do with this case. We are not asking the carriers to load or move the ships in or out of the port or out of the slip and back again.

697 All that we are asking the carriers to do is unload those cars and put the freight on the pier floor. When they do that, with respect to traffic and ship-side rates, their obligation is done. If that traffic has, in a particular circumstance, to go back to the warehouse, that is none of the carrier's concern, we do not ask them to do anything about that, so there is nothing to this talk about convenience of operation. All the carriers have ever been asked to do and expected to do is to bring the cars onto the pier, which they are doing with their Belt Line engine, and unload them.

Of course, that involved reasonable coordination between ship movement and rail movement. It would at any rail change, whether operated under civilian or military conditions. There is nothing about that exceptional or unusual. However, I do want to make that point very plain to the Commission: There is not a scrap of evidence in this case that any carrier ever complained that the actual handling of the cars was in any way inconvenient to it. It never complained that any car was detained on that pier an unreasonable time. It never complained that it could not get its cars on and off the piers as it saw fit to do. That is purely a red herring in this case which is purely without support in the evidence.

REBUTTAL ARGUMENT OF BENJAMIN J. BROOKS.

Mr. Brooks. Counsel for the carriers talked about principles involved, and that if the plaintiff wins this
698 case, it would be upsetting a lot of the principles with respect to allowances at piers and ports, and would be contrary to the *ex parte* 104 cases. That is not so at all. Not at all, not at all.

As I pointed out in my argument in chief, this situation here is quite different from that involved in the terminal cases involving industries. There, there is a question of just how far the line-haul rate actually extended. In a good many of those cases, of course, it hinged on how far the industry would permit the carriers to go at their own convenience and without interference, and all.

We have nothing like that here. That part of the movement would be analygous to the switch movement here. That

is between the line-haul movement, and the piers. However, here, that issue is not involved.

Commissioner Mahaffie asked me a question at the last argument, as to whether or not—I think it was along this line—whether or not the government might not have a claim for rendering that switching service, and I answered that I thought probably they did.

However, that is not in here. That brushes the *ex parte* 104 cases aside. What we have here is the question of wharfage and handling, which are definitely and positively included in the single factor, ship-side rate.

What does single factor mean? It means one
699 factor, one rate, including both line-haul and terminal services.

Commr. MAHAFFIE. If the switching service was not an obligation of the line-haul carrier, and I understand that was taken over by the War Department and performed by it, and it makes no claim on account of that, now is that not about a 2 mile interruption from where the line-haul service actually ends and where you want the unloading performed?

Mr. BROOKS. It is something in the neighborhood of 2 miles.

Commr. MAHAFFIE. Well, 2 miles, then, where the line-haul service ends.

Mr. BROOKS. That is true.

Commr. MAHAFFIE. And the place where you want the loading performed by the carrier or an allowance made?

Mr. BROOKS. I am not asking that the carriers perform the unloading: they say that in effect it had to be an Army operation. The majority of the Commission so found in its report that obviously anything but operation by the complainant was impracticable. My point is this, your honor, that that wharfage handling is in that single factor rate.

Now then, go back to that wharfage case in 157 ICC, where the question came up about separating the line-haul rates and the wharfage in handling, and terminal charges. What was the first question that the Commission passed on? The adequacy of the facilities held out by the carriers. The
adequacy of the facilities, and the Commission found,
700 then, that the facilities were adequate.

The next question they considered was anybody being injured. They stated in the report that opportunities were afforded the interested parties to show injury, but no substantial injury was shown.

The question then came up, should the carriers, in the light of all that, be obliged, after they have supplied adequate facilities, to turn traffic that they could handle at those facilities over to the municipal or private pier facilities. The Commission said no. So long as the carriers hold out these facilities and they are adequate and the service is satisfactory, no. We will tell these private pier operators —as you told them in the Weyerhaeuser case and there too you found the pier facilities were adequate. You said to the private pier people, if you want it, use your own private piers, you are going to have to pay twice. You said that in the wharfage case in 157, ICC. You pay once in the single factor shipside rate, and you again pay when you perform the services.

Commr. MAHAFFIE. Do you and Mr. MacGuineas differ as to the obligation of the railroad in these circumstances as to actually performing the unloading?

Mr. BROOKS. I take their railroads at their word. They say they just could not have done it. It would have to be an Army operation, with all of these complications that were involved there. My point is this: the railroads were
700A not in a position to render adequate service. Therefore, under the Commission's discussion, findings and all in the wharfage case in 157, ICC, if they had had the instant situation before them at that time, they would have ordered a separation, or an allowance.

The decision there, your honor will recall, was 6 to 5 in favor of not separating. Here very definitely they would have ordered the separation. However, I am not arguing for separation of the terminal charges from the line-haul rates. No, I very definitely take the position that there should be a continuance of those single factor ship-side rates, even though in the majority report and the last report it was stated that I did argue for separation of charges.

If you got that impression, I am sorry because I did not intend that at all.

Just one more word on this question of adequate facilities: It is admitted by everybody that the railroads are not in a position to serve. That being true, it was of necessity, there had to be a change in the charge. They had been making the holding out, their agent had performed this wharfage service and so forth and the agent had paid 4 cents 100 pounds. The railroads did not get that money, they got it and passed it on to the agent.

Now, what is the situation? The Army furnished the wharf, performed the service and the railroads keep the 4 cents, not on normal traffic but on 10 times normal.

701 Commr. Patterson. Are the local rates any less than the rate charged here with this service included?

Mr. Brooks. By a local rate, your Honor, you are talking about a domestic rate.

Commr. Patterson. That is right.

Mr. Brooks. On that score, of course, from trunk line territory, your rates are to Norfolk, export-import rates are substantially on the domestic level. It is to and from central territory where you have the lower rates on export and import traffic, and there, of course, you have Norfolk on the Baltimore basis and has been so for years and years.

Commr. Patterson. Then certain rates are the same as these rates were without this service included, and those rates are not unreasonable are they.

Mr. Brooks. No, because I think those domestic rates are on the basis the Commission prescribed. However, as the Commission has said time and time again, domestic rates are not necessarily the yardstick for export rates.

Commr. Mahaffie. You suggest a finding that these export rates are unreasonable to the extent of 4 cents?

Mr. Brooks. No, sir, I will come to that a little later. It is a question of unreasonable practice rather than unreasonable rates.

The Commission told the railroads, "We will protect you and your facilities so long as they are adequate to

702 take care of the job." They were adequate in normal times. When war-time came along, they were no longer adequate.

In that connection, I cited in my reply brief dated November 15, 1945, I cite several cases where the Commission has found that because of war-time conditions, export rates were found to be reasonable and not on the tariff involved which had been charged the full domestic rate. The Commission said that because of the war-time conditions, we find the export rates should be charged here.

You have the same kind of a situation here. It is a war-time emergency situation.

Now on this question of the private piers and private property and the fear of the carriers that this might spread, there is absolutely no foundation for that statement.

Your situation here is not at all comparable to a private pier operator with private goods or a shipper building a private pier and taking traffic away from the railroad piers.

No. The government took over the principle piers at Norfolk. They used them temporarily, and now they are back in the hands of the railroad or their agents and are being used again. There is nothing at all to that point.

Of course, there is the point of the wharfage charge of 1 cent. There is no point to that. That is included in the single-factor, ship-side rate.

The Army is now providing the wharfage, so the
703 are entitled to the 1 cent out of the single-factor ship-side rate.

On this question of many commodities not being carted, the wharfage absorption allowances, that is taken into consideration in the making of the rates on those allowances. This rate here considers commodities on which wharfage is included on the single-factor ship-side rates, and in which the railroad agent, if continued in charge, would have performed that service rather than the Army.

On the question of the rates being depressed, no. The only evidence in the case on that score is the showing with respect to the distances and the measure of the class rates to and from central territory, where, as everybody knows, the Norfolk rates have been on the same basis as Baltimore for a longer period of time than I have been here on this earth, and I am white-headed now. Maybe not an old man but beyond the 50 year mark.

In that connection, as I point out in my brief, the Commission has, in a number of cases, prescribed rates to and from Norfolk on export-import traffic on the same level as Baltimore. It just followed as a matter of course, that it would so be.

In at least one case, the Commission prescribed the same rate from Norfolk as from Baltimore on import traffic to points in central territory, and awarded reparations from Norfolk on the same basis as on traffic from Baltimore.

There is the King Powder Company case 61, ICC at 459.

Now the question here is not whether or not the rates
704 are reasonable maximum rates. The question has to do with an unreasonable practice.

In my latest brief or petition at pages 17 and 18, I cover that point. I want to direct your attention here to one case that went to the Supreme Court in the Adams versus Mills case, 286 U. S. at 397. The Supreme Court said, "the question of the issue is not the reasonableness of the charge but the lawfulness of the practice."

In Alberts Milling Company case, 256 ICC 491, the Commission said at page 499, "It is clear that the aggregate of

the line-haul rate of 25 cents and the switching charge of $6.44 is not inherently unreasonable".

But just the same, the Commission found it to be an unreasonable practice, and awarded reparations.

Now, the question of public interest was not even mentioned in the majority report.

Very definitely here the question of public interest should play a dominant part. In my brief I refer to that Santa Fe case, 232 U. S., where the Supreme Court held that whatever facilities and services the carriers were obliged to perform, they have a right to supply for themselves.

The Supreme Court also held there that the question of the interest of the public must be taken into consideration, and here, when you take into consideration the interests of the public, including the railroads, if you please,
705 very definitely what was done, the government taking over and operating the piers, was in the public interest, and the public should not be obliged to pay for it.

I thank you.

REBUTTAL ARGUMENT OF DONALD B. MACGUINEAS

Mr. MACGUINEAS. Mr. Commissioner, may I make one statement with respect to Mr. Brooks' position, with respect to the government.

He is here as *amicus curiae* only. He is not speaking for the government. If he stated as I understood him to state in response to Commissioner Mahaffie's question, that the government concedes that the switching service had been taken over by the government, that is not at all the government's position, we take the position that we were getting the so-called switching service, that is, bringing the cars actually onto the piers. We have no complaint about that, we were getting that by use of the Belt Line engine. There is no interruption of service in this case at all.

I also want to make it clear that the carriers could have performed this service at the piers if they had made a bona fide effort to do so.

Commr. PATTERSON. It was at your direction, by holding the cars out.

Mr. MACGUINEAS. Yes, but I say there was no interruption of service. We never contended that there was.
706 Commr. AITCHISON. The proceeding will be taken under advisement and the Commission is adjourned.

(Whereupon, at 12:20 o'clock p. m., oral argument in the above-entitled matter was closed.)

708 In the Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of the Record Necessary for Consideration Thereof

Filed Oct. 5, 1948

1. Now comes the appellant in the above-entitled cause and for its statement of points upon which it intends to rely in its appeal to this Court adopts the points contained in its assignment of errors heretofore filed herein.

2. The record in this cause as filed in this Court pursuant to appellant's amended praecipe to the Clerk of the United States District Court for the District of Columbia is necessary for the consideration of the foregoing points and appellant designates said record for printing by the Clerk of this Court.

Dated this 4th day of October, 1948.

PHILIP B. PERLMAN,
Solicitor General.

709 I hereby certify that a true copy of the attached Statement of Points to be Relied Upon and Designation of Parts of the Record Necessary for Consideration thereof was this day served upon the following counsel by mailing to each of them a true copy of said document:

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DAVID O. MATHEWS,
Special Assistant to the Attorney General,
Department of Justice, Washington, D. C.

Dated this 4th day of October, 1948.

710 In the Supreme Court of the United States

Appellees' Designation of Additional Parts of the Record for Printing.

Filed Oct. 14, 1948

Now come the Interstate Commerce Commission, Appellee in the above entitled case, and The Pennsylvania Railroad Company, The Virginian Railroad Company, Southern Railroad Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, and Norfolk Southern Railway Company, intervener-appellees, and designate the following additional parts of the record in this cause, as filed in this Court, for printing by the Clerk of this Court:

1. The following portions of the certified copy of the record made in the proceedings before the Interstate Commerce Commission, entitled *United States* v. *Aberdeen & Rockfish Railroad Co., et al.*, Docket No. 29117:
   1. The Complaint to the Commission.
   2. The stenographer's minutes of the hearing before the Interstate Commerce Commission at Norfolk, Virginia, on July 18 and 19, 1944, pages 1-350, inclusive.

711 3. Exhibit 1.
   4. Exhibit 3, pages 1-11 and 15-17, inclusive.
   5. Exhibit 4, pages 1-9, 17-23, and 26-46, inclusive.

6. Exhibits 8 and 9.
7. Exhibits 12-17, inclusive.
8. Exhibits 20, 21, and 25.
9. Exhibit 27, pages 1-5, inclusive.
10. Exhibit 28.
11. Exhibit 33.
12. The Examiner's proposed report.
13. The stenographer's minutes of oral argument on April 5, 1945, pages 351-406, inclusive; on April 3, 1946, pages 407-494, inclusive; on November 6, 1946, pages 495-566, inclusive.

DANIEL W. KNOWLTON,
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MARTIN A. MEYER, JR.,
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CHARLES CLARK,
Attorney for Southern Railroad Company.

712 I, DANIEL W. KNOWLTON, certify that copies of the foregoing Appellees' Designation of Additional Parts of the Record for Printing, were this day mailed to the following persons:

David O. Mathews, Esq.,
Special Assistant to the
Attorney General,
for Appellant, United States
of America.
Herbert A. Bergson, Esq.,
Assistant Attorney General,
for United States of America,
defendant.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

Dated this 13th day of October, 1948.

713 Supreme Court of the United States

Order Noting Probable Jurisdiction—
November 8, 1948.

The statement of jurisdiction in this case having been submitted and considered by this Court, probable jurisdiction is noted.

No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1918

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

IN THE

District Court of the United States

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 4729-47

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, THE PENNSYLVANIA RAILROAD COMPANY, THE VIRGINIAN RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, ATLANTIC COAST LINE RAILWAY COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the district court entered in this case on July 26, 1948. A petition for appeal is presented to the district court herewith, to wit, on August 25, 1948.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this case is conferred by Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U.S.C. Supp. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U.S.C. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Interstate Commerce Commission v. *Mechling*, 330 U. S. 567

Interstate Commerce Commission v. *City of Jersey City*, 322 U. S. 503

McLean Trucking Co. v. *United States*, 321 U. S. 503

STATUTES INVOLVED

Section 24 of the Judicial Code, as amended, 28 U. S. C. 41(28), provides in part:

> The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Section 208 of the Judicial Code, as amended, 28 U. S. C. 46, provides in part:

> Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. * * *

Section 212 of the Judicial Code, as amended, 28 U. S. C. Supp. 45a, provides in part:

> The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court,[1] and in the Supreme Court of the United States upon appeal from the Commerce Court. * * * *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; * * * *Provided further*, That * * * the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein.

Section 17(9) of the Interstate Commerce Act, as amended, 49 U.S.C. Supp. 17(9), provides:

> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or

[1] The Urgent Deficiencies Act of October 22, 1913, 38 Stat. 220, transferred jurisdiction of suits to set aside orders of the Interstate Commerce Commission from the Commerce Court to specially constituted three-judge district courts.

reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

THE ISSUES AND THE RULING BELOW

This is an action brought by the United States to set aside an order of the Interstate Commerce Commission which had dismissed a complaint filed with it in the proceeding known as *United States of America* v. *Aberdeen & Rockfish Railroad Company, et al.*[2] In this complaint the United States had sought an award for the damages which it had sustained because of the failure and refusal of certain railroads to provide wharfage and handling services, or to make an allowance in lieu thereof, on through rail-water shipments made by the Government which had moved over Army Base Piers 1 and 2 at Norfolk, Virginia, while these piers were being operated by the Army, i.e., from June 14, 1942, to about November 6, 1946. It was alleged that as a result of such failure and refusal the charges exacted of the Government were unjust and unreasonable, in violation of Sections 1(5)a and 1(6) of the Interstate Commerce Act; unjustly discriminatory, in violation of Section 2 of the Act; prejudicial to military traffic, in violation of Section 6(8) of the Act; and excessive in that no allowance was made to the owner for the

[2] For the Commission's report and order, and two prior reports in the same proceeding, see 269 I.C.C. 141, 264 I.C.C. 683, 263 I.C.C. 303.

use of its facilities in transportation or for its rendition of services connected with transportation, in violation of Section 15(13) of the Act.

The Government's petition, filed in the court below pursuant to the provisions authorizing suits to set aside orders of the Interstate Commerce Commission (28 U.S.C. 41(28), 43-48), named as defendants the Interstate Commerce Commission and the United States.[3] The Commission in its answer alleged that the district court lacked jurisdiction over the cause upon the ground that Section 9 of the Interstate Commerce Act gave the petitioner an election to file a complaint with the Commission or to bring suit against the railroads in a federal district court, and estopped petitioner, after it had elected to pursue the former remedy, from securing judicial review of the order entered by the Commission in the complaint proceeding. The Commission also pleaded, as an alternative defense, that its order of dismissal was valid.

The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railway Company, Seaboard Air Line Railroad Company, and Norfolk Southern Railway Company intervened as defendants pursuant to their statutory right to do so (28 U.S.C. Supp. 45a). The railroads' answer denied that the district court had jurisdiction over the cause and, in the alternative, asserted that the Commission's order was in all respects valid. The grounds given for the court's alleged lack of jurisdiction were: (a) that there was no

[3] The latter was named a defendant because of the statutory requirement (28 U.S.C. 46) that a suit of this kind be brought against the United States.

cause or controversy since in this action the United States was both plaintiff and defendant; (b) that the statute providing for suits to set aside orders of the Interstate Commerce Commission does not authorize the United States to institute such a suit, and (c) that such statute does not authorize a suit to set aside an order of the Commission which denies reparation for alleged prior violations of the Interstate Commerce Act.

The statutory three-judge district court held that Congress, when it enacted the statute governing suits to set aside orders of the Interstate Commerce Commission, did not intend to permit the United States to bring such a suit. The court, having determined that the statute does not authorize maintenance of the present action, did not reach the merits of the case. Nor did the court rule on the defense contention that the statute authorizing review of orders of the Interstate Commerce Commission does not comprehend an order of the type here involved.

THE QUESTIONS ARE SUBSTANTIAL

The appeal taken in this case presents the question whether the statute authorizing judicial review of orders of the Interstate Commerce Commission withheld such right of review from the United States. The Government is at all times a substantial shipper of commodities and in time of war may be the principal shipper. The Government, in its capacity as a shipper, is clearly entitled to claim the benefits of, and to assert the rights accorded by, the regulatory provisions of the Interstate Commerce Act. The decision of the district court means that the Government, alone among all other shippers, is denied judicial

review when it believes that rights which it asserts under the Act have been erroneously determined by the Commission. Furthermore, under the grounds upon which the district court rested its decision, review by the United States is equally barred whether the order sought to be questioned deals with future or past rates, charges, or practices. The question raised by the appeal, the Government's right to maintain this action, therefore presents an issue of large importance and a question of law of substance on which this Court has not heretofore passed. See, however, *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567; *McLean Trucking Co.* v. *United States*, 321 U. S. 67; *Mitchell* v. *United States*, 313 U. S. 80.

A second substantial question which the appeal will present is whether an order of the Commission dismissing a complaint seeking an award of the damages sustained by the complainant by reason of carrier rates, charges, or practices alleged to have been in violation of the Act, is an order of a kind which is reviewable under Section 208 of the Judicial Code (28 U.S.C. 46). The Government contends, but the defendants deny, that *El Dorado Oil Works* v. *United States*, 328 U. S. 12, establishes the reviewability of such an order. It is of vital concern to both shippers and carriers that this question be conclusively determined.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 25, 1948.

Filed June 28, 1948. Harry M. Hull, Clerk

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4729-47

UNITED STATES OF AMERICA, PLAINTIFF,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, DEFENDANTS

Before CLARK, Associate Justice, United States Court of Appeals for the District of Columbia; and McGUIRE and HOLTZOFF, Associate Justices, District Court of the United States for the District of Columbia, sitting as a statutory three-judge court.

HOLTZOFF, J.:

This is an action brought before a statutory three-judge court to set aside an order of the Interstate Commerce Commission, dismissing a complaint of the United States, by which the United States sought an allowance from certain railroads for wharfage and handling services rendered in connection with shipments made by the Government during World War II at Norfolk, Virginia. The action is brought under the Urgent Deficiencies Act (U. S. Code, title 28, sec. 41, par. 28, and secs. 43-48) and under Section 9 of the Interstate Commerce Act (U. S. Code, title 49, sec. 9).

For a great many years it had been the general practice of railroads serving North Atlantic ports, including Norfolk, to load and unload from car

to pier, and vice versa, traffic brought to the port by rail and intended to be transhipped by vessel. The charges for this service, known as wharfage, were included and absorbed in the railroad traffic rates. At the Port of Norfolk, the cost of this labor to the railroads was four cents per hundred pounds. This sum constituted the compensation paid by the carriers to The Transport Trading and Terminal Corporation, which actually performed this task in their behalf.

During World War II, the War Department shipped a substantial volume of goods from various points in the United States to Norfolk over the trunk line railroads serving that port, for transportation by vessel to points beyond Norfolk, as well as from points beyond Norfolk to points in the interior. Due to the emergency the Government took over the piers at which these goods were handled, and performed the wharfage services itself with its own employees. Nevertheless, the railroads persisted in charging and the Government continued to pay the full traffic rate for transportation, which included four cents per hundred pounds as cost of wharfage.

In view of the fact that the Government had performed the service itself, the United States filed a complaint with the Interstate Commerce Commission praying for reparation at the rate of four cents per hundred pounds on all of the goods that were handled by the Government at Norfolk in the above described manner. The Interstate Commerce Commission dismissed the complaint, on the basis of a finding that the refusal of the railroads to make the allowance to the United States for the wharfage services performed by the Government itself on its own shipments, was not an unsound or unreasonable practice, did not result in unreasonable or inapplicable rates and was not unjustly discriminatory to the United States. *United States* v. *Aberdeen & Rockfish RR. Co.*, 263 I.C.C.

303 and 264 I.C.C. 683. Thereupon the present action was brought to review the decision of the Interstate Commerce Commission and to set aside its order, which had been issued on July 25, 1947.

At the outset it becomes necessary to determine whether this action may be maintained. Section 9 of the Interstate Commerce Commission Act (U. S. Code, title 49, sec. 9, provides as follows:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt . . . ."

In other words, the law accords two alternative remedies to any person who is damaged by any action of a common carrier violative of the Interstate Commerce Act. The injured party either may make a complaint to the Interstate Commerce Commission or may bring an action for damages against the carrier in the District Court of the United States. The two remedies are mutually exclusive. In this instance, the United States did not choose to bring suit against the railroads in the District Court of the United States, but elected to present a complaint to the Interstate Commerce Commission. The United States now seeks a review of the adverse decision of the Commission by an action brought before a three-judge court.

The statute regulating actions to review orders of the Interstate Commerce Commission (U. S. Code, title 28, sec. 46) provides, in part, as follows:

> "Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States . . ."[4]

An action of this type is a suit against the United States, *United States* v. *Griffin*, 303 U. S. 226, 238.

In other words, a suit to review an order of the Interstate Commerce Commission must be brought against the United States as the defendant. Accordingly, in this action the United States of America is named both as the petitioner and as the defendant. The Interstate Commerce Commission is added as a co-defendant, although there seems to be no warrant in law for this course.[5] We are thus confronted with an anomaly,—a suit by the United States of America against the United States of America.

The United States is not a mere nominal party defendant. The legislative history of the above-mentioned statute demonstrates that the Congress deliberately and intentionally provided that such suits should be brought against the United States and that his requirement was no inadvertence. It was first introduced into the law by the Act which created the Commerce Court (Act of June 18, 1910, Sec., 3, 36 Stat. 539, 542). The provision was debated at length on the floor of each House. These discussions clearly indicate that it was the intention of the authors of the legislation that the Attorney General of the United States should appear in behalf of the United States and defend the action of

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[4] Such an action must be heard by a three-judge court, U. S. Code, title 28, sec. 47.

[5] The law authorizes the Commission to intervene in the suit, but does not provide for making the Commission a party defendant originally, U. S. Code, title 28, sec. 45a.

the Interstate Commerce Commission.[6] Attempts were made to modify this provision in order that the action might be brought against the Interstate Commerce Commission, rather than against the United States, but these endeavors were defeated. It is clearly, therefore, the duty of the Department of Justice to defend the order of the Interstate Commerce Commission. Necessarily, the Department may not be on both sides of the case. Yet an examination of the petition filed by the United States, and of the answer filed in its behalf, indicates that both pleadings were signed by the same Assistant Attorney General.

No person may sue himself, *Lord* v. *Veazie*, 8 How. 250; *Cleveland* v. *Chamberlain*, 66 U. S. 419; *Wood Paper Co.* v. *Heft*, 8 Wall. 333. This principle is applicable to the United States. The Government may not sue itself. This is true even

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[6] Senator Elihu Root made the following statement on the floor of the Senate (45 Cong. Rec. p. 4164):

> "The Attorney General would be bound upon all and the highest considerations of his professional honor and his official duty to defend the order of the Interstate Commerce Commission in all courts having jurisdiction to review it."

Representative Townsend said on the floor of the House of Representatives (45 Cong. Rec. p. 5525):

> ". . . when it (i.e. an order of the Interstate Commerce Commission) is attacked it becomes the duty of the Attorney General to defend."

Senator Sutherland (later Mr. Justice Sutherland) said (45 Cong. Rec. p. 6457):

> "The order of the Interstate Commerce Commission is quasi legislative, and, as I have said, it becomes, in substance and effect, the order of the Government of the United States, and it simply occurs to me that it is more fitting that the action to have the order declared invalid as invading the constitutional rights of the railroad company should proceed against the Government of the United States than it is to have it proceed against the Interstate Commerce Commission."

if the nominal plaintiff is a party who is subrogated to the rights of the Government. *Globe & Rutgers Fire Ins. Co.* v. *Hines*, 273 Fed. 774, 777; *Defense Supplies Corp.* v. *United States Lines Co.*, 148 F. (2d) 311.

In *Globe & Rutgers Fire Ins. Co.* v. *Hines*, *supra*, the court stated (p. 777):

> "It is elementary that the same person cannot be both plaintiff and defendant at the same time in the same action. It is incongruous that the same person should direct and conduct both the prosecution and the defense of the same suit, no matter in what capacity he may appear."

It may be observed in this connection, that the United States of America always acts in a sovereign capacity. It does not have separate governmental and proprietary capacities, *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477.[7]

The foregoing rules are but applications of the general doctrine that Federal courts may deal only with actual cases and controversies, *Muskrat* v. *United States*, 219 U. S. 346; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 239-241. Naturally there cannot be a controversy if the same party is both plaintiff and defendant. If attorneys representing the Department of Justice appear on both sides of the same case, there is no actual controversy, but merely a discussion or debate of a moot question.

It is the view of this court, therefore, that this action may not be maintained, as the United States of America is both plaintiff and defendant. This conclusion is accentuated by the fact that it is the duty of the Department of Justice under the statute to defend the action of the Interstate Commerce Commission.

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[7] *United States* v. *Horowitz*, 267 U. S. 458, which holds to the contrary, must be deemed to have been overruled by *Graves* v. *N. Y. ex rel. O'Keefe*, cited in the text.

The cases on which the Government relies are not in point. In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 573, the plaintiffs in the action brought before the three-judge court were A. L. Mechling, a water carrier, the Inland Waterways Corporation, and the Secretary of Agriculture. The later was authorized by a specific statutory provision to seek judicial relief with respect to rates and charges for the transportation of farm products. Consequently, it was not a case in which the United States was both plaintiff and defendant.

In *United States* v. *Public Utilities Commission*, 151 F. (2d) 609, a direct appeal was taken from an order of an administrative agency. This case, too, did not involve a situation in which the same party, the United States of America, was both plaintiff and defendant.

It is further urged that an order of the Interstate Commerce Commission of the type involved in this case is not reviewable in an action brought before a three-judge statutory court. This position is clearly sustained by *Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708; affirmed 325 U. S. 840, in which Judge Dobie wrote an exhaustive and persuasive opinion. It is argued, however, that this decision has been, in effect, overruled in *El Dorado Oil Works* v. *United States*, 328 U. S. 12. The opinion in the *El Dorado* case does not refer to the *Ashland* case. Whether the *Ashland* case must be deemed overruled, need not be decided, in view of the disposition heretofore indicated.

It has been suggested that unless the United States of America may maintain this action, it is without a remedy. This contention is hardly well-founded, because the United States has the opportunity of electing the other alternative remedy provided by the statute, namely, to bring suit against the common carriers in the United States District Court. Under any circumstances, this

Court must enforce the will of the Congress, which clearly did not contemplate or intend to permit a suit by the United States of America against the United States of America, to review an order of the Interstate Commerce Commission. If the situation here presented is a *casus omissus*, the remedy lies solely with the legislative branch of the Government.

In view of the foregoing considerations, we do not reach the merits of the case.

Judgment dismissing the complaint.

(S.) BENNETT C. CLARK,
Justice.

(S.) MATTHEW F. MCGUIRE,
Justice.

(S.) ALEXANDER HOLTZOFF,
Justice.

JUNE 28, 1948.

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No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, APPELLANT

v.

THE INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Questions presented	2
Statement	3
Summary of argument	10
Argument:	
I. The District Court had jurisdiction of the cause	14
A. The United States may invoke the Urgent Deficiencies Act	14
B. There is a justiciable case or controversy	31
C. The Commission's order is subject to review	36
1. The negative order doctrine	42
2. The alternative remedies doctrine	46
3. Private character of reparation cases	56
4. Discretionary power of the Commission in reparation cases	58
II. The Commission's order dismissing the Government's complaint is vitiated by errors of law and lack of a rational basis	61
A. Whenever a common carrier accepts goods for transportation to points beyond the termination of its line, the carrier is under a legal duty to provide the facilities and services needed in order to deliver the traffic safely to its connecting line	66
B. The Commission erred as a matter of law in holding that the railroads' tariff provisions, including in the rates, wharfage and handling services, became meaningless after June 15, 1942	71
C. The Commission's conclusion that the Government's control of the Army Base piers justified the railroads in treating those piers as private piers lacks a rational basis	76
D. There is no rational basis for the Commission's conclusion that control of the Army Base piers by the Government relieved the railroads of their obligation to provide wharfage and handling services	82

824038—49——1

Argument—Continued Page
II. The Commission's order dismissing the Government's complaint is vitiated by errors of law and lack of a rational basis—Continued
E. There is no rational basis for the Commission's conclusion that the railroads did not fail to provide reasonable pier facilities under the circumstances 87
F. The Commission's conclusion that the railroads' failure and refusal to provide wharfage and handling services or to make an allowance therefor was not unjustly discriminatory lacks a rational basis 88
G. There is no rational basis for the Commission's conclusion that the refusal of the railroads to provide wharfage and handling services did not result in unreasonable rates and charges on the Government's traffic 95
Conclusion 102
Appendix 103

CITATIONS

Cases:
Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227 33
Alabama v. *United States*, 325 U. S. 535 ..... 22, 35
Albany Port District Commission v. *Ahnapee & Western Railway Co.*, 219 I. C. C. 151 100
George Allison & Co. v. *United States*, 12 F. Supp. 862, affirmed, 296 U. S. 546 ..... 49, 51, 53
American Trucking Ass'ns v. *United States*, 56 F. Supp. 394 35
American Trucking Associations, Inc. v. *United States*, 326 U. S. 77 ..... 22, 35
Anaconda Copper Mining Co. v. *United States* (Com. Ct. June 7, 1912, unreported) 44
Arkansas Fertilizer Co. v. *United States*, 193 Fed. 667 44
Armour & Co. v. *Alton R. Co.*, 312 U. S. 195 ..... 17, 37, 47, 48, 51, 54
Ashland Coal & Ice Co. v. *United States*, 61 F. Supp. 708, affirmed, 325 U. S. 840 ..... 49, 51, 52, 58
Atchison, T. & S. F. Ry. Co. v. *United States*, 279 U. S. 768 89
Atchison, T. & S. F. Ry. Co. v. *United States*, 256 U. S. 205 17
Atlantic Lumber Corporation v. *Southern Pacific Co.*, 47 F. Supp. 511 ..... 52, 53, 58
Baltimore and Ohio R. Co. v. *Brady*, 288 U. S. 448 ..... 52, 53
Barringer & Co. v. *United States*, 319 U. S. 1 62
Bell Potato Chip Co. v. *Aberdeen Truck Line*, 43 M. C. C. 337 56

Cases—Continued

Page

Brady v. *Interstate Commerce Commission*, 43 F. 2d 847, affirmed, 283 U. S. 804 ..... 52, 53, 57, 58
Cargill, Inc. v. *United States*, 44 F. Supp. 368 27
Charges for Wharfage, Handling, Storage, and Other Accessorial Services at Atlantic and Gulf Ports, 157 I. C. C. 663 70
Chesapeake & Ohio Railway Company v. *Westinghouse, Church, Kerr & Co., Inc.*, 270 U. S. 260 86
Chicago & N. W. Ry. Co. v. *Wilcox Co.*, 68 F. 2d 883, certiorari denied, 293 U. S. 560 73
The Chicago Junction Case, 264 U. S. 258 ..... 38, 59
Cleveland v. *Chamberlain*, 1 Black 419 32
Crane Iron Works v. *United States*, 209 Fed. 238 44
Davis, Director General v. *Donovan*, 265 U. S. 257 32
The Fred B. Dalzell, Jr., 1 F. 2d 259 33
Defense Supplies Corporation v. *United States Lines Co.*, 148 F. 2d 311, certiorari denied, 326 U. S. 746 ..... 30, 32, 33
El Dorado Oil Works v. *United States*, 328 U. S. 12 ..... 12, 13, 34, 37, 38, 39, 40, 41, 51, 52, 56, 57, 61
Elimination of New York, N. H. & H. R. Pier Stations, 255 I. C. C. 305 81
Florida East Coast Ry. Co. v. *United States*, 234 U. S. 167 58
Galveston Commercial Assoc. v. *A., T. & S. F. Ry. Co.*, 25 I. C. C. 216 67
General American Tank Car Corp. v. *El Dorado Terminal Co.*, 308 U. S. 422 ..... 38, 55, 56, 63
Globe & Rutgers Fire Ins. Co. v. *Hines*, 273 Fed. 774, certiorari denied, 257 U. S. 643 32
Grain Proportionals, Ex-Barge to Official Territory, 248 I. C. C. 307 89
Great Northern Ry. Co. v. *Merchants Elevator Co.*, 259 U. S. 285 37
Henderson v. *United States*, 63 F. Supp. 906 23
Indianapolis v. *Chase National Bank*, 314 U. S. 63 ..... 33, 34
Inland Steel Co. v. *United States*, 306 U. S. 153 57
Intermountain Rate Case, 234 U. S. 476 60
Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144 89
Interstate Commerce Commission v. *Baltimore and Ohio R. Co.*, 225 U. S. 326 89
Interstate Commerce Commission v. *Columbus & G. Ry. Co.*, 319 U. S. 551 ..... 22, 35
Interstate Commerce Commission v. *Delaware, L. & W. R. Co.*, 220 U. S. 235 89
Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42 ..... 34, 63, 64, 90
Interstate Commerce Commission v. *Inland Waterways Corp.*, 319 U. S. 671 ..... 11, 22, 27, 30, 35, 36

Cases—Continued

	Page
Interstate Commerce Commission v. *Jersey City*, 322 U. S. 503	22, 35
Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88	58
Interstate Commerce Commission v. *Mechling*, 330 U. S. 567	11, 23, 25, 26, 30, 35, 36, 89
Interstate Commerce Commission v. *Oregon-Washington R. & N. Co.*, 288 U. S. 14	22, 35
Interstate Commerce Commission v. *Union Pacific Railroad Company*, 222 U. S. 541	45, 48
Kingan & Co., Terminal Allowance, 255 I. C. C. 531	84
Lewis-Simas-Jones Co. v. *Southern Pacific Co.*, 283 U. S. 654	54
Lighterage and Storage Regulations at New York, 35 I. C. C. 47	67
Livestock-Western District Rates, 176 I. C. C. 1	100
Lord v. *Veazie*, 8 How. 250	32
Louisville & Nashville R. Co. v. *United States*, 282 U. S. 740	89
McLean Trucking Company v. *United States*, 321 U. S. 67	22, 25, 35
Merchants Warehouse Co. v. *United States*, 283 U. S. 501	89
Missouri Pacific Railroad Co. v. *United States*, 71 C. Cls. 650	17
Mitchell v. *United States*, 313 U. S. 80	22, 25
Mitchell Coal & Coke Co. v. *Pennsylvania Railroad Company*, 230 U. S. 247	54, 55
John Morrell & Co., Terminal Allowance, 263 I. C. C. 69	84
Morrisdale Coal Co. v. *Pennsylvania Railroad Company*, 230 U. S. 304	54
Muskrat v. *United States*, 219 U. S. 346	33
Myrick v. *Michigan Central Railroad Company*, 107 U. S. 102	67
New York v. *United States*, 331 U. S. 284	15, 58
New York Central Railroad Co. v. *The Talisman, Long Island R. Co.*, 288 U. S. 239	67
North Carolina v. *United States*, 325 U. S. 507	22, 35
Peden Iron & Steel Company v. *Texas & New Orleans Railroad Company et al.*, 264 I. C. C. 769	78
Phillips v. *Grand Trunk Railway Co.*, 236 U. S. 662	57
Procter & Gamble v. *United States*, 225 U. S. 282	42, 44, 45, 48, 57, 58
Procter & Gamble v. *United States*, 188 Fed. 221	44
Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11	69, 85
Railroad Retirement Board v. *Duquesne Warehouse Co.*, 326 U. S. 446	62
Raymond City Coal & Transportation Corporation v. *New York Cent. R. Co.*, 103 F. 2d 56	74

Cases—Continued

	Page
Robinson v. *Baltimore and Ohio Railroad Company*, 222 U. S. 506	54, 55
Rochester Telephone Corp. v. *United States*, 307 U. S. 125	12, 16, 28, 37, 42, 46, 49, 50, 57, 59, 66
Russe & Burgess v. *Interstate Commerce Commission*, 193 Fed. 678	44
Seaboard Air Line Ry. Co. v. *United States*, 254 U. S. 57	89
Skinner & Eddy Corporation v. *United States*, 249 U. S. 557	34
Southern Pacific Co. v. *Lothrop*, 15 F. 2d 486, certiorari denied, 273 U. S. 742	74
Southern Pacific Co. v. *United States*, 53 C. Cls. 332	18
Southern Railway Company v. *Tift*, 206 U. S. 428	55
Standard Oil Co. v. *United States*, 283 U. S. 235	14, 49, 50, 51, 52
Stark v. *Wickard*, 321 U. S. 288	16
Texas v. *Interstate Commerce Commission*, 258 U. S. 158	26
Texas & Pacific Railway Company v. *Abilene Cotton Oil Company*, 204 U. S. 426	17, 37, 43, 47, 51, 53, 55
Texas & Pacific Railway Company v. *Reiss*, 183 U. S. 621	67
Thompson Lumber Co. v. *Interstate Commerce Commission*, 193 Fed. 682	44
Union Pacific Railroad Company v. *Updike Grain Company, et al.*, 222 U. S. 215	90, 91
Union Wire Rope Corporation v. *Atchison, T. & S. F. Ry. Co.*, 66 F. 2d 965	73
United States of America v. *Aberdeen & Rockfish Railroad Company, et al.*, 263 I. C. C. 303	8
United States of America v. *Aberdeen & Rockfish Railroad Company, et al.*, 264 I. C. C. 683	8
United States of America v. *Aberdeen & Rockfish Railroad Company, et al.*, 269 I. C. C. 1-1	8
United States v. *Carolina Freight Carriers Corp.*, 315 U. S. 475	66
United States v. *Chicago Heights Trucking Co.*, 310 U. S. 344	89
United States v. *Cooper Corp.*, 312 U. S. 600	16, 17, 18
United States v. *Public Utilities Commission of the District of Columbia*, 151 F. 2d 609, certiorari denied, 331 U. S 816	31, 36
United States v. *South-Eastern Underwriters Association*, 322 U. S. 533	20
United States v. *United Mine Workers*, 330 U. S. 258	15
United States v. *Village of Hubbard*, 266 U. S. 474	34
Virginian Ry. Co. v. *United States*, 272 U. S. 658	100
Weyerhaeuser Timber Co. v. *Pennsylvania R. Co.*, 229 I. C. C. 463	77, 78, 80
Wight v. *United States*, 167 U. S. 512	89
Wood-Paper Co. v. *Heft*, 8 Wall. 333	32
Wyoming Coal Co. v. *Virginian Ry. Co.*, 98 I. C. C. 488	100

Statutes:

	Page
Act of June 25, 1948, Pub. Law 773, 80th Cong., Sec. 39	2
Elkins Act, 32 Stat. 847, 49 U. S. C. 41–43	43
Government Corporation Control Act, 59 Stat. 597, 31 U. S. C. 846	30
Hepburn Act, June 29, 1906, 34 Stat. 584	43
Interstate Commerce Act, 49 U. S. C. 1 *et seq.*:	
Section 1 (4)	86
Section 1 (5) (a)	7, 110
Section 1 (6)	7, 110
Section 2	7, 88, 89, 91, 93, 94, 111
Section 4	99
Section 6 (1)	69
Section 6 (8)	7, 79, 84
Section 8	111
Section 9	8–9, 12, 42, 46, 47, 48, 49, 50, 52, 53, 56, 112
Section 13	49, 59
Section 14	60
Section 15 (1)	58
Section 15 (13)	7, 13, 63, 113
Section 15a (2)	101, 113
Section 16	60
Section 16 (1)	58
Section 16 (2)	59
Section 17 (9)	15, 114
Judicial Code as amended by the Urgent Deficiencies Act of October 21, 1913, 38 Stat. 208:	
28 U. S. C. (1946 ed.):	
Section 41 (28)	14, 103
Section 43	108
Section 44	104
Section 45	15, 104
Section 45a	9, 21, 105
Section 46	8, 107
Section 47	27, 108
Section 48	109
Mann-Elkins Act of June 18, 1910, 36 Stat. 539	14, 43
Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219	14
28 U. S. C. as amended by Public Law 773, 80th Cong., approved June 25, 1948:	
Sections 1253, 1336, 2101, 2284, 2321–2325	2
49 U. S. C. 151 *et seq.*	30

Miscellaneous:

Cong. Rec. Vol. 45:	
Pp. 3342–3344	44
P. 3539	24
P. 4104	23
P. 5159	24
Pp. 5214–5217	44

Miscellaneous—Continued
Cong. Rec. Vol. 45—Continued Page
P. 5235 24
P. 5430 24
P. 5525 23
P. 5526 19
P. 5527 20
P. 6339 21
P. 6340 21
P. 6393 24
P. 6447 24
P. 6452 24
P. 6457 23
P. 7367 24
Twenty-Fourth Annual Report of the Interstate Commerce Commission (1910) 44
Twenty-Sixth Annual Report of the Interstate Commerce Commission (1912) 44

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 380

UNITED STATES OF AMERICA, APPELLANT

v.

THE INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The specially constituted district court's opinion (R. 129) appears at 78 F. Supp. 580. The report of the Interstate Commerce Commission (R. 101) appears at 269 I. C. C. 141.

JURISDICTION

The final judgment of the district court was entered on July 26, 1948 (R. 134). The petition for appeal was filed and allowed on August 25, 1948 (R. 135, 136). The jurisdiction of this

Court to review by direct appeal the judgment entered in this case is conferred by 28 U. S. C. (revised) 1253. See also 28 U. S. C. (revised) 1336, 2101. Probable jurisdiction was noted by this Court on November 8, 1948 (R. 652).

STATUTES INVOLVED

The relevant provisions of Part I of the Interstate Commerce Act and of the Judicial Code, as amended by the Urgent Deficiencies Act [1] are set forth in the Appendix, *infra*, pp. 103–114.

QUESTIONS PRESENTED

1. Whether the statute authorizing judicial review of orders of the Interstate Commerce Commission withholds such right of review from the United States, as a shipper.

2. Whether this action by the United States presents a justiciable case or controversy.

3. Whether an order of the Commission dismissing a complaint seeking an award of damages sustained by a complainant by reason of carrier rates, charges, or practices alleged to have been

[1] The pertinent provisions of the Urgent Deficiencies Act were incorporated into Title 28, United States Code, by Public Law 773, 80th Congress, approved June 25, 1948 (28 U. S. C. (revised) 1253, 1336, 2101, 2284, 2321–2325). Unless otherwise noted, references to 28 U. S. C. — refer to that title as it stood before its revision by Public Law 773.

in violation of the Interstate Commerce Act, is an order of a kind which is reviewable under Section 208 of the Judicial Code (28 U. S. C. 46).

4. Whether the Commission's order dismissing the complaint of the United States is vitiated by errors of law or lack of a rational basis.

STATEMENT

Export traffic is ordinarily delivered to water carriers in order to reach its ultimate destination overseas. In order to accomplish such interchange of traffic, piers or wharves, usually are utilized so that railroad cars may be moved to points on the piers adjacent to ships, where the traffic can be removed from the railroad cars and be placed within reach of ships' tackle (R. 74, 78).

For many years the railroads serving the port of Norfolk, Virginia, have provided, as a part of the service covered by their rates applicable to export traffic, the piers needed at Norfolk to accomplish this interchange of export traffic between railroad cars and ships, which is commonly known as wharfage; and they have also provided the labor and other services needed to unload export traffic from railroad cars and place it within reach of ships' tackle, which are known in transportation parlance as handling services[2] (R. 74).

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[2] Wharfage and handling services also were provided by the railroads on import, coastwise, and intercoastal traffic which moved through the port of Norfolk.

Among other piers used by the railroads at Norfolk were the facilities known as Army Base Piers 1 and 2 (R. 76). These facilities were constructed by the Government during the first World War and, after the conclusion of hostilities, the piers were leased to the City of Norfolk (R. 76). Subsequently these piers were leased successively to Norfolk Tidewater Terminal, Inc., and Transport Trading and Terminal Corporation, private corporations, and the latter company continued in possession of the piers until on or about June 15, 1942 (R. 76).

In 1925, the Pennsylvania Railroad Company, having no pier facility in Norfolk and desiring to provide service for shippers and to secure an agent for solicitation of water-borne traffic over its lines, entered into a contract with Norfolk Tidewater Terminal, Inc., then operating the Army Base piers as public pier facilities, to act as such agent (R. 75). The stipulated compensation to it for such service, which was designated as compensation for wharfage, was 20 cents per ton of freight moving over the piers (R. 75). The Pennsylvania also employed Norfolk Tidewater Terminal, Inc., to unload freight from railroad cars for compensation of 60 cents per ton (R. 75). Subsequently, Official Territory railroads serving the port of Norfolk, except the Chesapeake & Ohio Railroad Company, made similar arrangements with Norfolk Tidewater

Terminal, Inc., or subsequent lessees of the Army Base piers.

The Official Territory railroads provided in their tariffs that their rates to Norfolk included the charges at certain piers for wharfage and handling services, not to exceed 20 cents per ton for wharfage and 60 cents per ton for handling services (R. 75). The names of the pier facilities, at which wharfage and handling service charges would be included in the rates of the Official Territory railroads, were set forth in the tariffs of the Norfolk and Portsmouth Belt Line Railroad Company, which was owned equally by eight line-haul railroads serving the port of Norfolk (R. 75). The facilities of the Transport Trading and Terminal Corporation, lessee and operator of the Army Base piers, were so named in those tariffs (R. 429).

The other railroads serving Norfolk provided in their tariffs that they would absorb charges for wharfage and handling services at Norfolk from their rates, not to exceed 20 cents per ton for wharfage and 60 cents per ton for handling services, or provide wharfage and handling services at no additional expense to a shipper (R. 75).

With the rapid increase in volume of its export traffic moving to support military and naval forces overseas in 1942, the United States became the principal shipper over the Army Base piers (R. 76). Owing to war conditions, the Govern-

ment deemed it necessary to assume control of the piers in order to expedite the movement of military freight, almost entirely outbound (R. 88). Accordingly, the Government cancelled its lease of the Army Base piers to Transport Trading and Terminal Corporation and took possession of the piers on or about June 15, 1942 (R. 88).

Notwithstanding this change in control, the railroads continued to provide in their tariffs that they would absorb the charges for wharfage and handling services at the specified pier facilities from their rates or that those facilities and services would be included in those rates (R. 84). The Government, through its War Department, requested the railroads to make it an allowance, as a shipper, for the expense incurred after June 15, 1942, in providing the piers and handling services on its traffic moving over the Army Base piers (R. 80). The railroads refused to make any such allowance (R. 80). Thereafter, on May 22, 1943, the Government requested the railroads to perform the handling services on traffic moving over the Army Base piers where the rates included such services (R. 80). This request also was refused by the railroads (R. 80).

On April 15, 1944, the United States filed a complaint against the railroads with the Interstate Commerce Commission, charging that the railroads, by reason of their refusal to make an allowance for wharfage and handling services on traffic moving over the Army Base piers or to

perform the handling services themselves on such traffic, on and after June 15, 1942, had subjected the Government to the payment of rates and charges which were, when exacted, unjust and unreasonable, in violation of Section 1 (5) (a) and Section 1 (6) of the Interstate Commerce Act (49 U. S. C. 1); unjustly discriminatory, in violation of Section 2 of the Act (49 U. S. C. 2); unduly prejudicial to military traffic and not in full compliance with Section 6 (8) of the Act (49 U. S. C. 6); and excessive and without any allowance to the owner for the use of its instrumentalities in transportation and for its rendition of services connected with transportation, in violation of Section 15 (13) of the Act (49 U. S. C. 15) (R. 150). In its complaint, the United States sought an award for the damages which it had sustained as the result of the alleged violations of the Act.[3]

After a hearing on the Government's complaint, Division 2 of the Commission (with Commissioner Barnard dissenting), on August 3, 1945, found that the railroads had violated the Interstate Commerce Act in certain respects and that the Government had been damaged thereby in the

[3] The Government's complaint also sought relief for the future but during the litigation before the Commission, on or about July 3, 1946, the Army Base piers reverted to operation similar to that in effect prior to June 15, 1942, so that the complaint, when dismissed on July 25, 1947, involved only the claim for damages (R. 610).

sum of 4 cents per hundred pounds, with interest, on its traffic which had moved over the Army Base piers on and after June 15, 1942. *United States of America* v. *Aberdeen & Rockfish Railroad Company, et al.*, 263 I. C. C. 303. The Commission (with Commissioners Aitchison, Splawn, Alldredge and Rogers dissenting) reversed Division 2 on May 3, 1946. *United States of America* v. *Aberdeen & Rockfish Railroad Company, et al.*, 264 I. C. C. 683. Upon reargument, the Commission (with Commissioners Splawn, Johnson, Rogers, Alldredge and Aitchison dissenting), on July 25, 1947, affirmed its prior decision and entered an order dismissing the Government's complaint. *United States of America* v. *Aberdeen & Rockfish Railroad Company, et al.*, 269 I. C. C. 141.

This action was brought by the United States under the Urgent Deficiencies Act to set aside the Commission's order dismissing the Government's complaint (R. 66–72). The petition filed by the Government named as defendants the Interstate Commerce Commission and the United States[4] (R. 66). The Commission, in its answer, alleged that the district court lacked jurisdiction over the cause upon the ground that Section 9 of

[4] The United States was named as a defendant because of the statutory requirement (28 U. S. C. 46) that a suit of this kind be brought against the United States. In its capacity as a statutory defendant, the United States filed a neutral answer (R. 118–119).

the Interstate Commerce Act (49 U. S. C. 9) gave the petitioner an election to file a complaint with the Commission or to bring suit against the railroads in a federal district court, and estopped petitioner, after it had elected to pursue the former remedy, from securing judicial review of the order entered by the Commission in the complaint proceeding (R. 115). The Commission also pleaded, as an alternative defense, that its order of dismissal was valid (R. 115–118).

The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railway Company, Seaboard Air Line Railroad Company, and Norfolk Southern Railway Company intervened as defendants pursuant to their statutory right to do so[5] (28 U. S. C. 45a) (R. 119). The railroads' answer denied that the district court had jurisdiction over the cause and, in the alternative, asserted that the Commission's order was in all respects valid (R. 125–127). The grounds given for the court's alleged lack of jurisdiction were: (a) that there was no case or controversy since the United States was both

[5] The Norfolk and Western Railway Company was one of the principal defendants named in the Government's complaint filed with the Commission. However, on December 28, 1945, that railroad made a compromise settlement of the complaint, under which the Government received approximately $865,000.00 (R. 561–562, 604). Accordingly, the Norfolk and Western did not intervene in the proceeding before the district court.

plaintiff and defendant in the action; (b) that the statute providing for suits to set aside orders of the Interstate Commerce Commission does not authorize the United States to institute such a suit; and (c) that such statute does not authorize a suit to set aside an order of the Commission which denies reparation for alleged prior violations of the Interstate Commerce Act (R. 123–124).

The cause was heard on May 5, 1948 (R. 1). The statutory three-judge district court filed its opinion on June 28, 1948 (R. 129). The district court held that Congress, when it enacted the statute governing suits to set aside orders of the Commission, did not intend to permit the United States to bring such a suit. The court, having determined that the statute does not authorize maintenance of the present action, did not reach the merits of the case. Nor did the court rule on the defense contention that the statute authorizing review of orders of the Commission does not comprehend an order of the type here involved.

The district court entered its judgment dismissing the action on July 26, 1948 (R. 134). The appeal therefrom was allowed on August 25, 1948 (R. 136), and on November 8, 1948, this Court noted probable jurisdiction (R. 652).

SUMMARY OF ARGUMENT

I

A. The jurisdictional provisions here involved place no limitation on the right of any party to

bring actions to set aside the Commission's orders and there is no basis for the conclusion that Congress intended that the United States should not be permitted to invoke judicial review. It is not to be assumed that Congress intended to withhold from the United States, where its pecuniary interests are directly involved, the same right of review which has been conferred on private parties. Not only has the United States as a defendant aligned itself on the side of plaintiffs, including the Secretary of Agriculture and the Inland Waterways Corporation, attacking the validity of the Commission's orders in a number of cases, without question or criticism by this Court, but also rights of the United States have been successfully asserted through its instrumentalities in suits to set aside the Commission's orders. Accordingly, it would seem that the United States may attack the Commission's order in its own name.

B. The mere circumstance that the United States is formally both plaintiff and a defendant does not make moot the controversy presented in this cause. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. For purposes of determining whether a constitutional "case or controversy" exists, substance, not form, is controlling. Where the Commission and parties affected by the Commission's orders are defendants in suits brought under the Urgent

Deficiencies Act, the fact that the United States, in asserting the invalidity of the Commission's orders, is required to name the United States as a party defendant does not provide any basis for holding that the controversy is moot, for the statute provides that the Commission and the other parties are authorized to carry on the litigation to a conclusion without regard to the action or non-action of the Attorney General. The asserted rule that the United States may not sue itself, relied upon by the district court, has no application in the circumstances of this case.

C. The Commission's order here involved is subject to review under the test established in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, and *El Dorado Oil Works* v. *United States,* 328 U. S. 12. The Commission had the initial and exclusive jurisdiction to hear and determine the Government's complaint, and legal consequences will flow from the Commission's order dismissing that complaint, since the order, if not set aside, will finally fix the right asserted by the United States. Decisions resting a denial of judicial review of the Commission's orders of the type here involved on the negative order doctrine, or an asserted election of remedies under Section 9 of the Interstate Commerce Act, or the alleged private character of reparation orders, or the theory that the Commission's exercise of discretion in reparation cases is not subject to review, are inconsistent

in principle and irreconcilable with the *El Dorado* case, *supra*.

II

Where a shipper provides a transportation facility or performs a transportation service, included in the common carrier obligation, the shipper ordinarily is entitled to receive a just and reasonable allowance from the carrier under Section 15 (13) of the Interstate Commerce Act (49 U. S. C. 15).

Furnishing wharfage and handling services on export traffic is transportation included in the common carrier obligation which carriers are under a legal duty to provide, and the Commission's conclusion to the contrary is erroneous as a matter of law and vitiates its order. The railroads' traiffs held the railroads out to provide wharfage and handling services at the Government's Army Base piers, and the Commission's conclusion that the provisions of the tariffs became meaningless after June 15, 1942, was clearly erroneous as a matter of law.

The Commission's conclusions which it believed excused the railroads from performing their common carrier obligation of providing wharfage and handling services at the Army Base piers or making an allowance in lieu thereof, lack any rational basis. Nor is there any rational basis for the Commission's conclusions that the failure and re-

fusal to provide wharfage and handling services or to make an allowance therefor (1) was not unjustly discriminatory and (2) did not result in unreasonable rates and charges on the Government's traffic.

ARGUMENT

I

THE DISTRICT COURT HAD JURISDICTION OF THE CAUSE

A. THE UNITED STATES MAY INVOKE THE URGENT DEFICIENCIES ACT

The Urgent Deficiencies Act confers upon the district courts original jurisdiction "of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."[6] 28 U. S. C. 41 (28). That Act further provides that "The jurisdiction of the district courts * * * shall be invoked by filing * * * a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the

[6] This provision first appeared in the Mann-Elkins Act of June 18, 1910 (36 Stat. 539), whereby Congress established the Commerce Court and delineated its jurisdiction. By the terms of the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 219), the Commerce Court was abolished and its jurisdiction was transferred to the district courts without any other substantial change. See *Standard Oil Co.* v. *United States*, 283 U. S. 235, 236–238.

relief sought." 28 U. S. C. 45. Section 17 (9) of the Interstate Commerce Act provides, without any limitation on the right of any party, that "any decision, order, or requirement" of the Commission may be reviewed by the courts (49 U. S. C. 17 (9)). Thus the jurisdictional statutes here involved place no limitation, in terms, on the right of any party to bring and maintain actions to set aisde the Commission's orders.

Not only does the absence of any such limitation support the right of the United States to bring and maintain this action, but also its right to invoke the jurisdictional statutes here involved is supported by the rule that statutes should not be interpreted in derogation of the rights of the United States unless Congress clearly and affirmatively, in express terms, has imposed a limitation upon such rights. *United States* v. *United Mine Workers,* 330 U. S. 258, 272.

The district court's interpretation of the Urgent Deficiencies Act, that it does not authorize actions by the United States to set aside the Commission's orders, applies not only to orders involving past rates but also to orders involving future rates. It is well established that private shippers are authorized to attack orders involving future rates. *New York* v. *United States,* 331 U. S. 284. The United States, if not the largest, is one of the largest shippers utilizing railroad

freight and passenger service. In the absence of language clearly imposing a limitation upon the right of the United States to seek judicial review of the Commission's orders, it is not to be assumed that Congress intended to withhold from the United States, where its own pecuniary interests are directly and substantially involved, the right of review which has been conferred upon private parties. Cf. *Stark* v. *Wickard*, 321 U. S. 288, 309.

This case is not governed by *United States* v. *Cooper Corp.*, 312 U. S. 600, where it was held that the term "any person" does not include the United States so as to give it a right to treble damages under Section 7 of the Sherman Act. Indeed, the criteria of statutory construction relied upon by the Court and the dissenting justices in the *Cooper* case confirm the right of the United States to maintain this action. Here the jurisdictional statute is not limited to "any person;" the scheme and structure of the Urgent Deficiencies Act and its amendments evidence an intent to confer jurisdiction on the courts in all cases; and the legislative history does not show that Congress intended to withhold from the United States the right to judicial review conferred on all other shippers. Until *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, not only the United States but also all other shippers were foreclosed by the negative order doctrine from invoking the Urgent Deficiencies Act to

review orders of the Commission denying reparations, so that the failure of the United States to invoke the Act heretofore has no significance.

There is no justification here, as was assumed in the *Cooper* case by the majority of the Court, for an interpretation of the jurisdictional provisions which would preclude the United States from invoking those provisions upon the ground that other direct remedies are available to the Government. Under the primary jurisdiction doctrine, the Commission had the initial and exclusive jurisdiction to hear and determine the Government's complaint for damages for violation of the Interstate Commerce Act, and, accordingly, other remedies were not available to the United States. *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195. The United States could not have protected itself by invoking criminal or equitable proceedings against the carriers in the absence of the indispensable administrative determination of the question whether the assailed rates and charges were unjust, unreasonable, discriminatory or otherwise unlawful. And where the United States has attempted to exercise the right of seizure without obtaining the indispensable administrative determination, the courts have required the Government to make restitution. *Atchison, Topeka & Santa Fe Railway Company* v. *United States*, 256 U. S. 205; *Missouri Pacific*

Railroad Co. v. *United States*, 71 C. Cls. 650, 662; *Southern Pacific Co.* v. *United States*, 53 C. Cls. 332. In sum, there is nothing here that precludes application of the well established general rule, cogently stated by Mr. Justice Black in his dissenting opinion in the *Cooper* case (p. 620), that "the United States can exercise all of the legal remedies which other persons, bodies or associations can exercise, both at common law and under statutes, unless there is something in a statute or in its history to indicate an intent to deprive the United States of that right." And the majority of the Court in the *Cooper* case did not reject this proposition; they held only that the terms and history of the Sherman Act evidenced a purpose to withhold from the United States the additional remedy of an action for treble damages under Section 7. As we show, however, the terms and history of the Urgent Deficiencies Act do not indicate a purpose to deprive the United States of the right to seek review of Commission orders, in circumstances where that right is available to all other shippers.

In the present case, the district court, not relying on an express limitation upon the right of the United States to seek judicial review, held that Congress clearly intended not to permit a suit by the United States of America against the United States of America, to review an order of the Interstate Commerce Commission (R. 134). If

that intention is not to be found in the words of the statute, it must be found, if at all, in its legislative history. But there is nothing in the legislative history of the Mann-Elkins Act which indicates that the jurisdictional statutes here involved are to be construed differently, simply because the aggrieved shipper happens to be the United States. In fact, some members of Congress recognized, while the legislation was being debated, that the rights of the United States might be adversely affected by the Commission's orders, and that the proposed jurisdictional statute, later enacted into law as the Mann-Elkins Act, would authorize suits by the United States to set aside the Commission's orders.[1]

[1] Thus, Mr. Norris, Representative from Nebraska, in opposing an amendment to the proposed legislation which would have required the Attorney General to defend the Commission's orders in all cases, participated in the following colloquy (45 Cong. Rec. 5526):

"Mr. Norris. * * * Mr. Chairman, I think, * * * it might be possible, if this amendment were adopted, the Attorney-General would be put in very embarrassing position. * * *

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* * * I submit that that kind of a condition might happen hundreds of times. It is not an impossibility, or even a remote condition, where the Attorney-General, under the specific statement of this law [proposed amendment], would have to defend the order of the commission, when, as a matter of fact, the Government of the United States would be trying to reverse that order.

"Mr. Adamson. Will the gentleman from Nebraska permit me to suggest that there is no provision for carrying

Moreover, even if Congress had failed to anticipate and provide for this particular problem, such a failure does not justify an interpretation which limits application of the broad terms of a legislative enactment, such as that here involved, so as to deny to the United States, in its capacity as a shipper, the substantial rights which Congress granted to all other shippers. Cf. *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 556–557.

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up cases for what the commission refuses to do? It is only the things that the commission does that we provide for attacking.

'Mr. NORRIS. Suppose the commission, as a matter of fact, makes an order, and that order is against the shipper. Suppose the Government of the United States has been ruled against by the commission.

"Mr. ADAMSON. There is no provision to deal with that.

"Mr. NORRIS. There is certainly a provision in this bill that gives the commission the right and the authority to make various kinds of orders.

"Mr. ADAMSON. It is what the commission does that is to be attacked, not what it does not do.

"Mr. NORRIS. The Attorney-General would be representing the Government. If the commission rules against the Government, then you would put the Attorney-General on both sides of the case.

"Mr. ADAMSON. You may attack what the commission does, but suppose it refuses to do anything.

"Mr. NORRIS. Suppose the Government wants to attack what the commission has done. Then where is the Attorney-General going to get off or on?"

Following this discussion, the proposed amendment, to require the Attorney General to defend the Commission's orders in all cases, was defeated (45 Cong. Rec. 5527).

In the Senate debate, Senator Heyburn insisted that the

The circumstance that the Act authorizes the Attorney General to represent the United States in suits brought to set aside the Commission's orders does not justify an interpretation denying the United States the right to invoke the jurisdictional statute. The statute expressly provides (28 U. S. C. 45a) that the Interstate Commerce Commission and any party or parties in interest to proceedings before the Commission may appear

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United States could, under the proposed bill, bring an action to set aside an order of the Commission. In discussing the jurisdiction of the Commerce Court to set aside such orders (item two of the enumeration of the Court's jurisdiction), Senator Heyburn said (45 Cong. Rec. 6339):

"* * * But there is an original right in this court under which a litigant may bring suit to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission. That is the suit contemplated by the later provision, providing that the Attorney-General may bring suit."

Also, it was specifically pointed out in the Senate that no limitation whatever had been placed by Congress upon the parties who would be authorized to bring actions to set aside orders of the Commission. Thus, Senator Heyburn said (45 Cong. Rec. 6340):

"A proceeding for an injunction is so well understood and so well defined in law and in practice that it requires no argument any more than the mere statement of the proposition that if a party (and it does not limit the parties or specify them) may bring a suit in this court for the purpose of enjoining them * * * it must be in the ordinary proceeding in equity."

Thus, it is clear that Congress was informed that no limitation had been adopted to preclude judicial review on the request of any interested party, and also that the United States, in certain cases, could be an interested party seeking to enjoin or set aside an order of the Commission.

in cases brought to set aside the Commission's orders, and be represented by their own counsel, and that the Attorney General shall not dispose of or discontinue such suits over the objection of any such party, and that such parties may defend and continue such proceedings unaffected by the action or non-action of the Attorney General. Here the Commission was made a party defendant to the action and the railroads intervened as defendants, as they were authorized to do by law, and both the Commission and the railroads defended the Commission's order. This Court has held in analogous cases that the fact that the Attorney General is authorized to represent the United States in such cases does not confer on him the power to control the litigation at any stage over the objection of the other parties, and that any aggrieved party may obtain the same relief which the United States may secure where it defends the action. *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.*, 288 U. S. 14, 25–26. See also, *Mitchell* v. *United States*, 313 U. S. 80; *McLean Trucking Co.* v. *United States*, 321 U. S. 67; *Interstate Commerce Commission* v. *Columbus & G. Ry. Co.*, 319 U. S. 551; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671; *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503; *North Carolina* v. *United States*, 325 U. S. 507; *Alabama* v. *United States*, 325 U. S. 535; *American Trucking Associations, Inc.* v. *United States*,

326 U. S. 77; *Henderson* v. *United States*, 63 F. Supp. 906 (D. Md.); *Interstate Commerce Commission* v. *Meehling*, 330 U. S. 567. Accordingly, the Attorney General's authority to defend the Commission's orders provides no basis for denying to the United States the right to attack such orders where it is adversely affected thereby.

As has been noted (*supra*, note 7, pp. 19–21), a proposal before Congress to require the Attorney General to defend the Commission's orders in all cases was defeated after certain Senators and Representatives had pointed out that the United States might wish to attack an order of the Commission. The statements made by certain Senators during the debate on the Mann-Elkins Act (45 Cong. Rec. 4104, 5525, 6457), relied upon by the district court as support for its subsidiary conclusion that it was the intention of the authors of the legislation that the Attorney General should appear and defend the action of the Commission in all cases (R. 131–132), and the court's ultimate conclusion predicated thereon, that Congress did not contemplate or intend to authorize a suit by the United States to review an order of the Commission, do not in fact support the construction made by the court below. The proposal before Congress, advocated by the Senators who made those statements, was to lodge in the Attorney General exclusively the power to defend orders of the Commission, and to exclude the Com-

mission and shippers from appearing in such cases and urging their views as to the validity of the Commission's orders. The statements of the Senators, relied upon by the district court, were made in response to suggestions that the Attorney General might not always find it expedient to defend the Commission's orders, and thus subvert the efforts of the Commission to carry out the purpose of the Interstate Commerce Act. The proposal advocated by those Senators did not prevail, but, on the contrary, Congress "made it plain and clear that the right of the shipper and the right of the Interstate Commerce Commission [to defend the Commission's orders] should be coequal with that of the Government"[8] (45 Cong. Rec. 7367). Accordingly, the Senators' state-

[8] The district court treated the statements made by those Senators as adequate support for its conclusion that the United States is not a mere nominal party defendant. In reviewing the legislative history, the court apparently considered insignificant the many statements made by members of Congress that the United States, in fact, would be only a nominal party defendant (45 Cong. Rec. 5159, 5235, 5430, 3539, 6393, 6447, 6452). It should be noted that, while the United States normally defends actions brought to set aside the Commission's orders, it is not required or expected to defend in every case, and it would seem that the legislative history and contemporary and long-standing construction of the jurisdictional provisions (*infra*, pp. 25–31) justify the view that Congress has not made the position of the United States as a defendant so paramount as to manifest an intention on the part of Congress to deny to the United States, as a shipper, the right of review available to other shippers.

ments do not, as the district court believed, evidence an intention to withhold from the United States the right to invoke the proposed jurisdictional statute; on the contrary, rejection of the legislation as proposed tends to support the opposite conclusion.

Moreover, actual experience shows that the Attorney General has opposed the Commission in cases instituted under the Urgent Deficiencies Act, thus negating the conclusion of the district court that Congress, by providing that the Attorney General is authorized to defend suits to set aside orders of the Commission, did not contemplate or intend to authorize a suit by the United States to set aside such orders. It is significant that in a number of cases brought under the Urgent Deficiencies Act, the Attorney General has aligned himself on the side of the plaintiff attacking the validity of orders of the Commission and has appeared in opposition to the Commission, and this action has neither been questioned nor criticized by this Court. See *Mitchell* v. *United States*, 313 U. S. 80; *McLean Trucking Company* v. *United States*, 321 U. S. 67; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. In the *Mechling* case the United States, represented by the Attorney General, was accorded the right to be treated as an appellee over the objections of the Commission (330 U. S. 574), and the United States aligned

itself with the Secretary of Agriculture and the Inland Waterways Corporation, plaintiffs in the district court, and actively opposed the Commission before this Court (330 U. S. 569).

Implicit judicial recognition thus appears to have been given to the fact that necessarily some determinations made by the Commission, an independent governmental agency, will be regarded as erroneous by the highest legal officers of the Government and that, where this is so and where the interests of the Government are adversely affected, those officers may stand before the courts in opposition to the Commission. There may be a difference of form, but certainly there is none of substance, between the cases where the United States, although formally a party defendant, has appeared on behalf of a party plaintiff, and this case, where it is, *eo nomine,* both plaintiff and a defendant.

The fact that the United States must be named a party defendant in suits to set aside the Commission's orders likewise provides no basis for denying the United States the right to invoke the jurisdictional statutes, especially where, as here, the Commission is made a party defendant. This Court held in *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 165, "that suits to set aside, annul or suspend the Commission's orders should be brought in the District Courts where all proper parties, including

the United States, may be made defendants and accorded an appropriate hearing." In *Cargill, Inc.* v. *United States*, 44 F. Supp. 368 (N. D. Ill.) (later reversed on the merits in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671), the district court specifically held (p. 375) that "The carrier defendants were properly joined in these suits and the Court has jurisdiction over said carrier defendants." The statute here involved provides, with respect to applications for preliminary injunctions, for notice to the Commission and "to such other persons as may be defendants in the suit." 28 U. S. C. 47. Thus, the Commission and other persons affected by the Commission's orders not only may intervene but they also may be made parties defendant in suits to set aside the Commission's orders. As heretofore noted, the Commission and other persons properly defendants in such proceedings may defend and continue such suits unaffected by the action or non-action of the Attorney General, representing the United States as a defendant. Accordingly, the fact that Congress assigned to the United States the role of defendant in suits to set aside the Commission's orders can not be construed as evidencing an intention to withhold from the United States the right to maintain such suits where its rights as a shipper are adversely affected by the Commission's orders.

The suggestion that the presence of the Commission and the railroads as defendants in this controversy is not sufficient to sustain the right of the United States to maintain this action is without merit, since it is predicated upon the erroneous assumption that relief in the proceeding can be granted only against the United States. In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, this Court clearly described the character of relief appropriate in suits brought under the Urgent Deficiencies Act and designated the party against whom the relief is directed (p. 136):

> Clearly Procter & Gamble was authorized under § 13 of the Act to Regulate Commerce to institute the proceedings before the Commission. Since it asserted a legal right under that Act to have the Commission apply different principles of law from those which led the Commission to dismiss the complaint, the ingredients for an adjudication—constituting a case or controversy—were present. * * * Judicial relief would be precisely the same as in the recognized instances of review by courts of Commission action: if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of

its own discretionary authority on the indicated correct principles.

The so-called rule that a person may not sue himself, relied upon by the district court as support for its conclusion that Congress did not contemplate or intend to authorize a suit by the United States to set aside the Commission's orders (R. 132), has no application here. Where, as here, there is involved a jurisdictional statute providing that, in suits to set aside orders of the Interstate Commerce Commission, the United States shall be named as a party defendant, and where the actual controversy is between the United States, as a shipper, and the railroads, contesting an order of the Commission, and all parties affected by the order are properly before the court, and the Commission and the railroads are authorized to carry on the litigation to a conclusion, unaffected by either the action or non-action of the United States as a defendant, surely it would be absurd to apply the alleged rule that the United States may not sue itself. The matter is a practical one, which should be governed by realities and not by technicalities or legal fictions. And the practical fact here is that the United States is the plaintiff, and in no real sense a defendant. The ultimate question here is one of statutory construction, and there is nothing in the statute, either explicitly or implicitly, which denies to the United States the right to obtain re-

view of adverse orders of the Interstate Commerce Commission.

The right of the United States to maintain this action also is sustained by *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, and *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. In the former case the Inland Waterways Corporation, an instrumentality of the United States,[9] brought suit against the United States under the Urgent Deficiencies Act to set aside an order of the Commission, and the action was heard and determined on its merits. In the *Mechling* case, the Inland Waterways Corporation, the Secretary of Agriculture, and a non-government water barge carrier brought separate suits (later consolidated) under the Urgent Deficiencies Act, and the suits were heard and determined on their merits. As the Inland Waterways Corporation was asserting rights of the United States as a water carrier in both cases, it seems clear that the United States was the real party plaintiff in both proceedings.[10] *Defense Supplies Corp.* v. *United States Lines Co.*, 148 F. 2d 311 (C. A. 2), certiorari denied, 326 U. S. 746.

As this Court appears to have recognized the

[9] 49 U. S. C. 151, *et seq.*

[10] The Inland Waterways Corporation, Defense Supplies Corporation, and others, are classified as "wholly owned Government corporations" for budgetary purposes. Government Corporation Control Act, 59 Stat. 597, 31 U. S. C. 846.

right of the United States as a defendant to take a position adverse to an order of the Commission on behalf of not only private parties but also the Secretary of Agriculture and the Inland Waterways Corporation, and as rights of the United States have been successfully asserted through its instrumentalities under the Urgent Deficiencies Act, the United States clearly has the right to oppose the Commission in its own name. And the right of the United States to attack an order of a governmental commission has been upheld in a similar case. *United States* v. *Public Utilities Commission of the District of Columbia*, 151 F. 2d 609, 610 (C. A. D. C.), certiorari denied, 331 U. S. 816.

B. THERE IS A JUSTICIABLE CASE OR CONTROVERSY

The court below considered that the principle that no person may sue himself was applicable to the United States and dispositive of the present case. It thought that this principle was but an application of the general doctrine that federal courts may deal only with actual cases and controversies, and that "naturally there cannot be a controversy if the same party is both plaintiff and defendant [but] merely a discussion or debate of a moot question" (R. 133). It concluded that, since the United States is both plaintiff and a defendant in this case, there could be no "controversy" and the action could not be maintained.

The prohibition against a person's suing himself is soundly grounded upon the absence of controversy when the same person conducts both prosecution and defense. In some of the cases cited by the court below, an identity of interest on both sides of the supposed controversy obtained either because the plaintiff had purchased the defendant's interest in the subject matter of the litigation or for some similar reason.[11] In other cases cited by the court, the defendant was a nominal plaintiff and an additional plaintiff asserted an interest adverse to the defendant, but decision turned upon application of the well established principle of suretyship that the surety, in paying off a debt, acquires no greater rights than the creditor had. *Globe & Rutgers Fire Ins. Co.* v. *Hines,* 273 Fed. 774 (C. A. 2), certiorari denied, 257 U. S. 643; *Defense Supplies Corp.* v. *United States Lines Co.,* 148 F. 2d 311 (C. A. 2), certiorari denied, 326 U. S. 746.[12]

[11] *Lord* v. *Veazie,* 8 How. 250; *Cleveland* v. *Chamberlain,* 1 Black 419; *Wood-Paper Co.* v. *Heft,* 8 Wall. 333.

[12] The *Globe & Rutgers* case held that the insurer of property of Railroad A, operated by the Director General of Railroads, could not recover over against the Director General of Railroads, as operator of Railroad B, in a case where damage to property of Railroad A was caused by the negligent operation of Railroad B. In *Davis, Director General* v. *Donovan,* 265 U. S. 257, this Court cast doubt upon the validity of the *Globe & Rutgers* case and held that the Director General was to be considered as a separate entity with respect to each railroad property he operated. The court of appeals which decided the *Globe & Rutgers* case sub-

But substance and not form determines whether there is a constitutional case or controversy. *Indianapolis* v. *Chase National Bank,* 314 U. S. 63. As pointed out in that case, the answer to many problems of law is to be found not in legal learning but in the realities of the record. "Litigation is the pursuit of practical ends, not a game of chess" (314 U. S. 69). In order for there to be a case or controversy within the jurisdiction of the federal courts, it is only necessary that there be "actual controversies * * * between adverse litigants" (*Muskrat* v. *United States,* 219 U. S. 346, 361) or a "real and substantial controversy" between "parties having adverse legal interests" (*Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–241). Whether the necessary collision of interests exists is not to be determined by mechanical rules, but "must be ascertained from the 'principal purpose of the suit,' *East Tennessee, V. & G. R.* v. *Grayson,* 119 U. S. 240, 244, and the 'primary and controlling matter in dispute,' *Merchants' Cotton Press Co.* v. *Insurance Co.,* 151 U. S. 368, 385." (314 U. S. 69.)

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sequently refused to follow it. *The Fred B. Dalzell, Jr.,* 1 F. 2d 259, 262 (C. A. 2). In the *Defense Supplies Corporation* case, the holding was that the Defense Supplies Corporation, a tax-free corporate instrumentality of the United States, could not sue the United States for damage to a cargo of wool transported for it by the War Shipping Administration since the Suits in Admiralty Act did not contemplate such an action.

"And so we turn to the actualities of this litigation" (314 U. S. 70). Here there is actual controversy between adverse parties. The United States as plaintiff is suing to enforce a right secured by the Interstate Commerce Act—that shippers are entitled to transportation at just, reasonable, and nondiscriminatory rates and charges.[13] On one side of the case, the United States is asserting the invalidity of an order of the Interstate Commerce Commission; on the other side, the Commission and the intervenor railroads are asserting the validity of the order. On the outcome of this controversy hinges the right of the United States to recover substantial damages from the railroads. There is thus an actual controversy between adversary interests, and no mere moot debate.

The fact that the statute required naming the United States as a defendant does not affect the reality of this controversy. It is settled that the other defendants, the Commission and the railroads, had the right to conduct their defense independently of any action or inaction by the United States in its capacity as a statutory defendant. The Commission may appeal although

[13] The United States' interest as a shipper is such as to give it standing to sue. *United States* v. *Village of Hubbard*, 266 U. S. 474; *The Chicago Junction Case*, 264 U. S. 258; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *El Dorado Oil Works* v. *United States*, 328 U. S. 12.

the United States has refused to join in the appeal. *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.*, 288 U. S. 14; 22; *Interstate Commerce Commission* v. *Columbus & G. Ry. Co.*, 319 U. S. 551. In a number of cases, the United States has filed neutral answers to a complaint brought pursuant to the Urgent Deficiencies Act. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671; *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503; *North Carolina* v. *United States*, 325 U. S. 507; *Alabama* v. *United States*, 325 U. S. 535. In still other proceedings under the Act, the United States has confessed error in the district court, but such confession did not terminate the proceedings or render it moot inasmuch as the Commission (and usually other parties), independently entitled to defend the action, denied error. *McLean Trucking Co.* v. *United States*, 321 U. S. 67; *American Trucking Associations, Inc.* v. *United States*, 326 U. S. 77; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567.[14]

[14] In the *American Trucking Ass'ns* case, the Seaboard Railroad in the district court challenged the right of the United States to "be heard in this anomalous role, which virtually amounts to stultification" (*American Trucking Ass'ns* v *United States*, 56 F. Supp. 394, 400). The district court said as to this (*ibid.*):

"We hold that the United States cannot confess error so as to make it binding upon us to grant the relief desired by plaintiffs. In *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 69, 64 S. Ct. 370, error was confessed by the United

This Court has upheld the right of a wholly owned Government corporation to bring suit under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission adversely affecting rights which the corporation asserted in its capacity as an instrumentality of the United States.[15] The fact that in these cases the Court has passed upon the merits of the controversies presented would seem to establish that where, as here, the United States itself is the plaintiff, there is an actual controversy between adverse parties and a "case" or "controversy" which, within the limitations of the Constitution, federal courts have power to adjudicate. *United States* v. *Public Utilities Commission of the District of Columbia*, 151 F. 2d 609 (C. A. D. C.), certiorari denied, 331 U. S. 816, likewise stands for the proposition that a justiciable case or controversy exists where the United States invokes review proceedings against one of its lesser creatures.

C. THE COMMISSION'S ORDER IS SUBJECT TO REVIEW

The United States contends that the Commission's order is subject to review under the

States, yet the Supreme Court affirmed the decree of the three-judge District Court, refusing to set aside orders of the Commission. On the other hand, we were glad to consider the brief and oral argument of counsel for the United States".

[15] *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, and *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, previously discussed (*supra*, p. 30).

"proper application of the combined doctrines of primary jurisdiction and administrative finality," the test established by this Court "as a touchstone of jurisdiction to review the Commission's orders," in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 142, 143.

Under the primary jurisdiction doctrine, the Commission had the initial and exclusive jurisdiction to hear and determine the Government's complaint for damages resulting from the failure and refusal of the railroads to provide wharfage and handling services or to make an allowance in lieu thereof on its traffic that moved over the Army Base piers at Norfolk. *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285; *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195. The doctrine of administrative finality is fully satisfied here, as "legal consequences" will flow from the Commission's order which, if upheld, will finally fix a "right or obligation." *Rochester Telephone Corp.* v. *United States*, *supra*, pp. 131–2; *El Dorado Oil Works* v. *United States*, 328 U. S. 12, 18–19.

The *El Dorado* case, *supra*, firmly establishes the proposition that the district courts possess jurisdiction to review orders of the Commission dismissing complaints attacking past practices and seeking administrative findings with respect

to the unlawfulness of such practices, to be utilized for the recovery of damages. There El Dorado Terminal Co., assignee of El Dorado Oil Works (328 U. S. 16), had commenced an action in the district court to recover upon its contract with the General American Tank Car Corporation certain payments made by the railroads under their tariffs to the Car Corporation as allowances for the use of tank cars it had leased for a stipulated sum per car per month to Oil Works. The Car Corporation defended the action on the ground that payments by it in excess of the stipulated car rental which Oil Works, by the agreement in controversy, had undertaken to pay the Car Corporation for use of the cars, would be unlawful because they would constitute a rebate and, thus, would be contrary to the Interstate Commerce Act. The district court sustained the Car Corporation's defense, which action was reversed by the circuit court of appeals. This Court held that the district court had jurisdiction of the assumpsit action but, before it could proceed, that the Commission should determine whether the "challenged past practices" were lawful and valid, as required by the primary jurisdiction doctrine. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422.

In accordance with this Court's decision, El Dorado Terminal Co. and El Dorado Oil Works

instituted a proceeding before the Commission, seeking its administrative determination of the question whether the Car Corporation could make the payments provided for in its contract with Oil Works without violating the Interstate Commerce Act (328 U. S. 17). The Commission found "that a just and reasonable allowance to Oil Works would be the cost incurred by it in furnishing the cars, namely the monthly rental to the Car Company, that any amount in excess of that would be unjust and unreasonable in violation of § 15 (13) and would 'constitute a rebate and discrimination and involve departure from the tariff rules applicable, prohibited by section 1 of the Elkins Act, and section 6 (7) of the Interstate Commerce Act * * *'." (328 U. S. 17–18.)

Thereafter, El Dorado Oil Works and El Dorado Terminal Co. brought suit in the district court under the Urgent Deficiencies Act, challenging the validity of the Commission's determination. The Commission challenged the jurisdiction of the district court to hear and determine the case, contending that in view of the fact that the Commission's finding affected only the private right of the plaintiffs to obtain damages in their assumpsit action in the district court, which had been stayed pending entry of the finding, the Commission's function was comparable to that exercised by it in reparation cases under Sec-

tion 9 of the Interstate Commerce Act and hence, the determination was not subject to review. In that connection, the Commission and the United States, which had joined the Commission in defense of the action, in a memorandum filed with this Court on February 8, 1946, contended:

> Besides maintaining that the Commission's report was fully responsive to the decision of this Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, we maintain that its report affects only the private right of appellants to obtain a money judgment in their suit against General American Tank Car Corp., recovery being conditioned, among other things, upon an administrative determination by the Commission under Section 15 (13) of the Interstate Commerce Act. Under this aspect of the case the function of the Commission is comparable to that exercised by it in reparation cases under Section 9. Its findings therein are unassailable in a suit under the Urgent Deficiencies Act (*Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708 (E. D. Va.), affirmed 325 U. S. 840). * * *

This Court rejected those contentions and reversed the district court, which had dismissed the suit for want of jurisdiction. *El Dorado Oil Works* v. *United States*, 328 U. S. 12, 18–19. In taking jurisdiction, this Court said, "the Commission's findings and determination if upheld

constitute far more than an 'abstract declaration.' *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 143. 'Legal consequences' (*id.* at 132) would follow which would finally fix a 'right or obligation' (*id.* at 131) on appellants' part." (328 U. S. 18–19.)

There is no substantial difference between the Commission's determination in the *El Dorado* case and its determination in this case. This is shown by this Court's opinion in the *El Dorado* case (328 U. S., at 19–20):

> First, it must be noted that the Commission made its determination as to the lawfulness of these past practices on the basis of appellants' own application, asking the Commission to do so. Second, our previous opinion, as well as the Interstate Commerce Act, authorized the Commission to make this determination. The question before us when this case was first here did not relate to future but past allowances. Relying on past decisions, we held that the "reasonableness and legality" of the past dealings here involved were matters which Congress had entrusted to the Commission. See e. g., *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291 and other cases cited in our previous opinion.

Thus, although, in the past, the courts have refused to review orders of the Commission involving only past rates and practices, it is now

established that such orders are subject to review under the Urgent Deficiencies Act.

Examination of prior decisions in which the courts have declined to entertain cases brought to review the Commission's orders involving only past rates and practices discloses that those rulings have been predicated, in whole or in part, upon (1) the negative order doctrine, (2) the alternative remedies provided by Section 9 of the Interstate Commerce Act (49 U. S. C. 9), (3) an asserted private character to claims concerning past shipments as distinguished from the quasi-legislative nature of complaints seeking changes in rates and practices for the future, and (4) an alleged discretionary power in the Commission to hear and determine with finality, complaints attacking past rates and practices, not subject to the review available where future rates and practices are determined.

1. *The negative order doctrine.*—The negative order doctrine, initially established in *Procter & Gamble* v. *United States*, 225 U. S. 282, was held to be no longer controlling "as a touchstone of jurisdiction to review the Commission's orders", in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 143. However, the influence of the negative order doctrine on other jurisdictional questions which appeared after the *Procter & Gamble* decision makes it desirable to discuss the scope of review available prior to that decision.

Initially, all orders of the Commission were only prima facie evidence as to the facts found to be in support of the orders, and the findings were subject to trial *de novo* in all actions to enforce such orders. *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. The Hepburn Act of 1906, 34 Stat. 584, provided for the enforcement of the Commission's orders, except those for the payment of money, by courts of equity. Enforcement of orders for the payment of money was excepted from the equitable remedy in order to afford trial by jury on the question of damages. The Hepburn Act conferred on courts of equity authority to enjoin, set aside, annul, or suspend, orders of the Commission.

The Mann-Elkins Act of June 18, 1910, 36 Stat. 539, created the Commerce Court and vested in that body exclusive jurisdiction over suits to enjoin or set aside the Commission's orders, suits for the enforcement of those orders except those for the payment of money, suits to prevent unjust discrimination and rebating under the Elkins Act (32 Stat. 847, 49 U. S. C. 41–43), and applications for writs of mandamus to compel carriers to comply with certain provisions of the law. Under the Urgent Deficiencies Act, the jurisdictional statute here involved, the Commerce Court was abolished and its jurisdiction was transferred to the district courts.

Subsequent to the Hepburn Act of 1906 and prior to the Mann-Elkins Act, suits to enjoin and set aside the Commission's orders of dismissal in reparation cases were brought in the circuit courts. See *Twenty-Fourth Annual Report of the Interstate Commerce Commission* (1910), pp. 23–25. After the Commerce Court had been established, those cases were transferred to that tribunal. The Commerce Court ruled that it had jurisdiction of such cases and it decided some of those cases on their merits. *Crane Iron Works* v. *United States*, 209 Fed. 238; *Russe & Burgess* v. *Interstate Commerce Commission*, 193 Fed. 678; *Arkansas Fertilizer Co.* v. *United States*, 193 Fed. 667; *Thompson Lumber Co.* v. *Interstate Commerce Commission*, 193 Fed. 682;[18] *Procter & Gamble* v. *United States*, 188 Fed. 221; *Anaconda Copper Mining Co.* v. *United States* (Com. Ct. June 7, 1912, unreported). Those decisions were vacated by the Commerce Court and many other cases pending before it were dismissed after the decision of this Court in *Procter & Gamble* v. *United States*, 225 U. S. 282. See *Twenty-Sixth Annual Report of the Interstate Commerce Commission* (1912), p. 34.

[18] During the Congressional debate on the Mann-Elkins Act, the *Thompson Lumber* case and the *Russe & Burgess* case were referred to and it was stated that the Commerce Court would have jurisdiction of these cases under its jurisdiction of suits brought to enjoin, set aside or annul orders of the Commission (45 Cong. Rec. 3342–3344; 5214–5217).

In the *Procter & Gamble* case, *supra*, Procter & Gamble had instituted a proceeding before the Commission against certain railroads to recover reparations on account of demurrage charges which the railroads had collected from Procter & Gamble. The Commission denied reparations. Procter & Gamble then brought suit in the Commerce Court to set aside the Commission's order denying reparations. The Commerce Court held that it possessed the power to set aside the Commission's order and, as a corollary of that power, decided that it had jurisdiction to award reparations for demurrage charges collected by the railroads. However, the Commerce Court sustained the Commission's order of dismissal on its merits. This Court held that the Commerce Court lacked jurisdiction over the Commission's order dismissing Procter & Gamble's complaint because the order was negative, that is, not affirmative in terms (225 U. S. at 293), and that the Commerce Court could not award reparations, since that would involve the substitution of its judgment for that of the Commission (225 U. S. at 297), a reference to the limitation on judicial power which previously had been clearly enunciated in *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, 547.

It seems clear that the *Procter & Gamble* decision was based solely on the negative character of the Commission's order dismissing Procter &

Gamble's complaint (*Rochester Telephone Corp. v. United States*, 307 U. S. 125, 135–6), and not upon any of the grounds that were to make their appearance later and become interwoven with the negative order doctrine. Moreover, the *Procter & Gamble* decision indicates that, prior thereto, the courts had jurisdiction to review the Commission's orders dismissing reparation complaints.

2. *The alternative remedies doctrine.*—Section 9 of the Interstate Commerce Act (49 U. S. C. 9) provides that any person claiming to be damaged by any common carrier subject to the Act may either make complaint to the Commission or bring suit for the recovery of such damages in any district court of the United States of competent jurisdiction; but that such person or persons shall not have the right to pursue both of said remedies and must in each case, elect which one of the two methods of procedure he or they will adopt. The district court here held that the suggestion that unless the United States may maintain a suit under the Urgent Deficiencies Act to review the Commission's order of dismissal, it is without a remedy, "is hardly well founded, because the United States has the opportunity of electing the other alternative remedy provided by the statute, namely, to bring suit against the common carriers in the United States District Court" (R. 134).

This conclusion appears to be clearly erroneous. In *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426, this Court stated (p. 442):

> In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of.

Since, under the primary jurisdiction doctrine initially established in the *Abilene* case, the Government's complaint for damages before the Commission involved administrative questions exclusively within its jurisdiction, this Court's interpretation of Section 9 in the *Abilene* case clearly foreclosed initial resort to the courts in this case and would bar institution of such complaints for damages before the courts in all cases involving administrative questions. In *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, Armour contended that it had a right under Section 9 to proceed in the district court for an alleged breach

of duty under the Interstate Commerce Act and to recover damages alleged to have resulted from the asserted violation of the Act. The district court dismissed Armour's complaint for want of jurisdiction. This Court unanimously affirmed this ruling. After referring to the *Abilene* case (312 U. S. 197) and summarizing the administrative problems that necessitated primary resort to the Commission (312 U. S. at 200–202), this Court stated, "The principles making up the so-called primary jurisdiction doctrine are well settled. This is obviously a case for their application." (312 U. S. at 202.)

Section 9, with its alternative remedies for damages, obviously refers to original jurisdictions, and not to appellate or review jurisdiction. Clearly, Section 9 does not refer to the institution of cases to review the Commission's orders under the Urgent Deficiencies Act, for the district courts in such cases have no power to award damages for violations of the Interstate Commerce Act. It has long been well established that in cases brought under the Urgent Deficiencies Act the power of the district courts is limited to determination of whether there has been violation of the Constitution, failure to conform to statutory authority, or the arbitrary exercise of power. *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, 547; *Procter & Gamble* v. *United States*, 225 U. S. 282, 297;

Rochester Telephone Corp. v. *United States*, 307 U. S. 125, 147.

Thus, it is well established that Section 9 has no application to complaints for damages involving administrative questions which, under the primary jurisdiction doctrine, are within the Commission's initial and exclusive jurisdiction. The person damaged simply has no election in such cases. Further, it is clear that Section 9 refers to alternative original jurisdictions of cases seeking an award of damages, and not to suits instituted under the Urgent Deficiencies Act seeking review of the Commission's action on claims presented to it under Section 13 of the Interstate Commerce Act (49 U. S. C. § 13).

Notwithstanding those firmly established propositions, the appellees here contend that the Government, having filed its complaint for reparations with the Commission, has made an election under Section 9 which estops it from maintaining this action under the Urgent Deficiencies Act. This contention rests upon this Court's decision in *Standard Oil Company* v. *United States*, 283 U. S. 235, subsequently referred to in *George Allison & Co.* v. *United States*, 12 F. Supp. 862 (S. D. N. Y.), affirmed, 296 U. S. 546, and *Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708 (S. D. Va.), affirmed, 325 U. S. 840.

The *Standard Oil* decision was rested first on the negative order doctrine, later overruled in

Rochester Telephone Corp. v. *United States*, 307 U. S. 125. Secondly, this Court held that the question as to which Standard Oil sought judicial determination was, in fact, an administrative question within the primary jurisdiction of the Interstate Commerce Commission. The third alternative ground for decision upon which the appellees rely heavily did rest on the elective provisions of Section 9. But this Court's discussion of that ground was rested on the assumption, contrary to the decision which it had announced in the preceding paragraphs of its opinion, that the question involved could, in the first instance, be decided by a district court. That was not the case here since, as we have shown, the question here involved could only be decided by the Commission as an original matter. Moreover, Section 9 was deemed applicable in the *Standard Oil* case, even on this assumption, only because Standard Oil sought from the three-judge court not only review of the order of the Interstate Commerce Commission but, in addition, "the same relief it failed to secure from the Commission" (283 U. S. at 241); i. e., an order directing an award of reparations. In the case at bar, the United States sought from the district court neither a money judgment nor an order directing the Commission to make an award. It sought and now seeks only to have the order denying relief set aside and a direction to reconsider the case in the light of the correct rule of law. See *infra*, pp. 61–102. The essential differ-

ence between this case and *Standard Oil* is that the Government seeks judicial review of a Commission order, while Standard Oil sought a judicial order as a substitute for what was held to be an indispensable administrative determination.

The *Allison* decision must be read as having been rested on the now discredited negative order doctrine. To treat this Court's *per curiam* opinion in that case as having any broader significance would require reading into that summary order a decision to overrule or modify the primary jurisdiction doctrine initially established in *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 442, and reaffirmed in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, decided subsequently to the *Allison* case. Similarly, the *Ashland* case, though it cannot be read as resting on the negative order doctrine, cannot be taken as rejecting the primary jurisdiction doctrine and, indeed, this Court has not so treated it.

As heretofore noted (*supra*, p. 40), the *Ashland* decision was urged upon this Court in *El Dorado Oil Works* v. *United States*, 328 U. S. 12. The Commission and the United States there contended that the Commission's function in determining El Dorado's complaint was comparable to that exercised by it in reparation cases under Section 9, and, hence, that its findings were unassailable in a suit under the Urgent Deficiencies Act, citing the *Ashland* decision in support of

that contention. The analogy between Ashland's complaint before the Commission and that of El Dorado is apparent. Both Ashland and El Dorado sought money judgments, and recovery by both depended upon obtaining a favorable administrative determination from the Commission. Yet this Court rejected the contention made by the Commission and the United States because legal consequences would follow which would finally fix a right or obligation if the Commission's determination were upheld (328 U. S. at 18–19). Hence, it seems clear that the *Ashland* decision (and *a fortiori*, the *Standard Oil* and *Allison* cases), to the extent that it stands for the proposition that Section 9 forecloses review under the Urgent Deficiencies Act, must be deemed to be no longer authoritative.

Likewise, cases such as *Brady* v. *Interstate Commerce Commission*, 43 F. 2d 847 (N. D. W. Va.), affirmed, 283 U. S. 804; *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448, and *Atlantic Lumber Corporation* v. *Southern Pacific Co.*, 47 F. Supp. 511 (D. Ore.), to the extent they hold that Section 9 precludes review under the Urgent Deficiencies Act, also appear to be no longer controlling. Moreover, the *Brady* cases and the *Atlantic* case involved no administrative question which, under the primary jurisdiction doctrine, gave the Commission exclusive jurisdiction over the complaints. In *Baltimore & Ohio R. Co.* v. *Brady*,

supra, this Court said, "The facts stated in the complaint clearly show that there was no question in this case requiring the exercise of the Commission's administrative powers." (288 U. S. at 457.) In the *Atlantic* case, "The ground of the [Commission's] decision was that the higher rate collected was in accord with and lawful under the established tariff." (47 F. Supp. at 512.)

There is no apparent reason why Section 9 should be held to foreclose review under the Urgent Deficiencies Act, for Section 9 obviously refers to alternative original jurisdictions and it should not be held to mean that judicial review is precluded where the complainant elects to go to the Commission. But if Section 9 operates so as to preclude review under the Urgent Deficiencies Act in any case, it seems clear that the rule applies only where the complainant has an election, as in the *Brady* cases and the *Allison* case, and that the rule has no application where, under the primary jurisdiction doctrine as established in the *Abilene* case (204 U. S. at 442) and reaffirmed in the *Armour* case (312 U. S. at 202), the complainant has no election of remedies.

Here the Government had no election of remedies. If it had attempted to file its complaint with a federal district court as ordinarily constituted, as both the Commission and the railroads contend and the district court held that the Government had a right to do, it is clear that

the primary jurisdiction doctrine would have required the district court to dismiss the complaint for want of jurisdiction, in conformity with this Court's decision in *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195. See also, *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654;[17] *Robinson* v. *Baltimore and Ohio Railroad Company*, 222 U. S. 506.

The *Armour* case appears to dispose of the suggestion that the Government had a right under Section 9 to bring its action before a court and to require that the proceeding be suspended while the Government secured by a complaint proceeding before the Commission, the indispensable administrative determination required under the primary jurisdiction doctrine. Armour's suit was dismissed for want of jurisdiction, not suspended pending the entry of administrative findings by the Commission. Thus, cases such as *Morrisdale Coal Co.* v. *Pennsylvania Railroad Company*, 230 U. S. 304, 314-315; *Mitchell Coal & Coke Co.* v. *Pennsylvania Railroad Company*,

[17] In *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 661, this Court said:

"It [the Interstate Commerce Act] makes a determination by the Commission of the unreasonableness of the rate attacked and the extent that it is, if at all, excessive a condition precedent to suit. * * * no action for damages alleged to have been caused by the exaction of excessive rates for interstate transportation can be maintained in any court, state or federal, in the absence of a prior finding by the Commission that the rate charged was unreasonable."

230 U. S. 247, 266–7; and *Southern Railway Company* v. *Tift*, 206 U. S. 428, 434–5, no longer are controlling. Moreover, those cases involved special considerations which apparently persuaded this Court not to dismiss them for want of jurisdiction.[18] Compare those cases with *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 442, 446, and *Robinson* v. *Baltimore and Ohio Railroad Company*, 222 U. S. 506. In the latter case, this Court said (p. 511) "it is apparent that neither provision [Sections 22 and 9] recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or state, in the absence of an appropriate finding and order of the Commission."

Cases in assumpsit, such as *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308

[18] Thus, in the *Mitchell* case, *supra*, this Court stated: "But owing to the peculiar facts of this case, the unsettled state of the law at the time the suit was begun and the failure of the defendant to make the jurisdictional point *in limine* so that the plaintiff could then have presented its claim to the Commission and obtained an order as to the reasonableness of the practice or allowance,—*direction is given that the dismissal be stayed*, so as to give the plaintiff a reasonable opportunity within which to apply to the Commission for a ruling as to the reasonableness of the practice and the allowance involved; and, if in favor of the plaintiff, with the right to proceed with the trial of the cause in the district court, in which the defendant shall have the right to be heard on its plea of the statute of limitations as of the time the suit was filed and any other defense which it may have" (230 U. S. 266, 267). [Italics supplied.]

U. S. 422, involving questions clearly within the general jurisdiction of the district courts but incidentally requiring resort to the Commission for determination of administrative questions arising during the course of the litigation before the courts, obviously afford no support for the proposition that the Government here had any independent right to proceed initially before a court and request the court to stay its hand pending resort to the Commission for determination of the administrative question. This Court itself made this distinction in the course of its opinion in the *El Dorado* case, 308 U. S. at 432–433. Likewise, cases such as *Bell Potato Chip Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337, have no application here because no provision comparable to Section 9 is involved in such cases to give original jurisdiction to the Commission.

Thus, it seems clear that Section 9 has no application to proceedings instituted under the Urgent Deficiencies Act, especially where, as here, the problem involved is within the initial and exclusive jurisdiction of the Commission.

3. *Private character of reparation cases.*—This Court's decision in *El Dorado Oil Works* v. *United States*, 328 U. S. 12, authoritatively answers the contention that the quasi-judicial, or private, character of the Commission's orders denying reparations precludes review under the Urgent Deficiencies Act. There El Dorado, a shipper,

sought and secured the determination of the Commission as to what would be a just and reasonable allowance under the Interstate Commerce Act for cars which the shipper had furnished the railroads, and this Court took jurisdiction of the shipper's suit to review the Commission's determination, brought under the Urgent Deficiencies Act. As has been noted (*supra*, p. 40), the Commission and the United States unsuccessfully urged that the district court lacked jurisdiction because the Commission's "report affects only the private right of appellants to obtain a money judgment."

Moreover, it is well established that findings made by the Commission in reparation cases inure to the benefit of all shippers similarly situated and hence, such proceedings are not private in character. See *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157; *Phillips* v. *Grand Trunk Railway Co.*, 236 U. S. 662, 665; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 142.

The notion that the quasi-judicial, or private, character of reparation suits precludes review under the Urgent Deficiencies Act had its genesis in the negative order cases. Compare *Brady* v. *Interstate Commerce Commission*, 43 F. 2d 847, 850–851 (N. D. W. Va.), with *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 293. Its force as a factor in determing the reviewability of the Commission's orders ended with the *El Dorado* case, *supra*.

In sum, cases [10] purporting to rest on the proposition that the quasi-judicial, or private, character of reparation suits precludes review under the Urgent Deficiencies Act have been thoroughly discredited. There is no longer any basis for contending that the quasi-judicial, or private, nature of reparation proceedings forecloses review.

4. *Discretionary power of the Commission in reparation cases.*—There is nothing in the Interstate Commerce Act which indicates that the Commission's discretion in reparation proceedings is any greater than or different from its discretion in proceedings seeking rates for the future. Compare Sections 15 (1) and 16 (1) of the Act (49 U. S. C. 15, 16). In the case of orders of the Commission prescribing rates for the future, the doctrine of administrative finality does not preclude review under the Urgent Deficiencies Act (*Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91; *Florida East Coast Ry. Co.* v. *United States*, 234 U. S. 167, 185; *New York* v. *United States*, 331 U. S. 284). There appears to be no reason for assuming that Congress intended that the doctrine of administrative finality should preclude entirely judicial

[10] *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Ashland Coal & Ice Co., Inc.* v. *United States*, 61 F. Supp. 708 (S. D. Va.); *Atlantic Lumber Corporation* v. *Southern Pacific Company*, 47 F. Supp. 511 (D. Ore.); *Brady* v. *Interstate Commerce Commission*, 43 F. 2d 847 (N. D. W. Va.).

review under this Act of orders denying reparations. Indeed, such an intention could not be imputed to a Congress which provided review where reparation is granted (49 U. S. C. 16 (2)) to an extent at least as great as that here sought where reparation is denied.

It is well established that the term "administrative finality" denotes that the Commission's orders are subject to review on a narrow range of issues, not a lack of review. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139–140. Thus Court rejected a contention in the *Chicago Junction Case*, 264 U. S. 258, 264–5, that approval of a proposed acquisition by a carrier of the property of another was a matter wholly within the discretion of the Commission, which precluded judicial review of the Commission's order of approval. In that connection this Court said, "Congress by using the phrase 'whenever the Commission is of opinion, after hearing', prescribed quasi-judicial action." Further, this Court stated that "These [the Commission's] orders, so far as considered by this Court, have uniformly been held to be subject to judicial review."

Where complaints seeking reparations are filed with the Commission, Section 13 of the Interstate Commerce Act (49 U. S. C. 13) affirmatively requires the Commission to investigate the com-

plaint. Section 16 of the Act (49 U. S. C. 16) imposes upon the Commission the duty to hold a hearing on the complaint. Sections 14 (49 U. S. C. 14) and 16 of the Act require the Commission to determine the facts as revealed by the investigation and, affirmatively, to make an award of reparations if the statutory standards are determined to so require. Thus, those provisions governing reparation proceedings clearly denote only a judicial discretion, and they do not provide any basis for a contention that Congress has conferred any arbitrary power on the Commission in such proceedings.

In the *Intermountain Rate Case*, 234 U. S. 476, 491, this Court stated that the standards of review of the Commission's orders,

> but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion be not transcended which by necessary implication carries with it the existence of judicial power to correct wrongs done by such excess.

It is submitted that the discretion conferred upon the Commission, whatever its scope in cases like this, is nevertheless subject to review by the courts under the Urgent Deficiencies Act.

II

The Commission's Order Dismissing the Government's Complaint Is Vitiated by Errors of Law and Lack of a Rational Basis [20]

Commissioner Alldredge, in dissenting from the Commission's Report on Reconsideration, said (R. 100):

> The issue in this proceeding is, after all, a simple one. Prior to 1942, wharfage and handling between cars and ships at the particular piers involved were provided by private interests and the charges therefor, totalling 4 cents per 100 pounds, were absorbed by the defendants. This practice, together with other circumstances shown of record, establishes the fact that the line-haul rates of the defendants were made in contemplation of the absorption by them of these terminal charges. On June 15, 1942, the United States Army found it advisable or necessary, on account of the exigencies of war, to take over these terminal facilities and to perform the services; but defendants continued to exact the same line-haul

[20] In their respective statements as to jurisdiction, the Commission and the intervener railroads requested that if, on this appeal, this Court should decide that the lower court had jurisdiction, it should then pass on the validity of the Commission's order. Such procedure was followed in *El Dorado Oil Works* v. *United States*, 328 U. S. 12. Appellant concurs in this request that the Court dispose of the appeal on the merits and has, therefore, prepared this argument to show the invalidity of the Commission's order.

rates that applied when they absorbed the charges of their terminal agent.

The Government's complaint before the Commission was predicated upon the proposition that the railroads' common carrier obligation in the transportation of export traffic by railroad from interior points to Norfolk, Virginia, included the obligation not only to provide line-haul service, but also to furnish the piers and handling services required in order to place the export traffic within reach of ships' tackle. In other words, the Government's case was based upon the contention that providing piers and handling services on export traffic is a transportation service. This Court has held that unloading carload freight is "a part of transportation service within the meaning of the Interstate Commerce Act." *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 326 U. S. 446, 453. See, also, *Barringer & Co.* v. *United States*, 319 U. S. 1, 6. The railroads serving Norfolk, Virginia, have recognized for more than 50 years that providing piers and handling services on export traffic is a transportation service, without which export traffic could not be transferred to ships and, thereby, be transported to its ultimate destination. This recognition has been reflected in the railroads' tariffs fixing rates applicable to the transportation of export traffic to Norfolk (R. 74–75).

Here the Government provided piers and han-

dling services on its export traffic that moved from interior points to Norfolk for transportation therefrom by vessel to points overseas from June 15, 1942, until on or about July 3, 1946 (R. 610). Although it is undisputed that providing those facilities and services cost the Government more than four cents per hundred pounds of traffic (R. 85), the Government sought to recover as damages only four cents per hundred pounds, the amount previously paid by the railroads to the Transport Trading and Terminal Corporation for providing the same facilities and services (R. 85).

It is well established that where a shipper provides a transportation facility or performs a transportation service, included in the common carrier obligation, the shipper ordinarily is entitled to receive a just and reasonable allowance from the carrier under Section 15 (13) of the Interstate Commerce Act (49 U. S. C. 15). In *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, where it was found that the shipper had provided cars to the railroads, this Court stated (p. 431): "The shipper was then entitled, under the plain terms of § 15 (13), to be paid by the carrier a just and reasonable allowance for providing the facility."

This proposition long has been settled. In *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, this Court reviewed an order of the

Commission involving the question of whether an allowance should be made to a shipper for providing elevator service on his own grain. There the Commission ruled that making an allowance for providing a transportation facility was merely permissive and not mandatory on railroads under the terms of the Interstate Commerce Act, and that the Commission therefore, could prohibit allowances to shippers if it deemed such prohibition necessary to prevent undue preference. But this Court rejected the Commission's construction of the Act and set aside the order of the Commission based on such construction. This Court said (pp. 46–47):

> We agree with the Court below that this decision is erroneous in its conception of the grounds on which under the statute an advantage may be pronounced undue, and in its assumption that Congress has left the matter open by merely permissive words * * * On the contrary the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of

June 18, 1910, c. 309, § 12, 36 Stat. 539, 551).

Alternatively, the Government's complaint before the Commission was predicated upon the contention that the export rates named in the railroads' export tariffs, which included wharfage and handling services, were just and reasonable for providing the complete transportation service, and that the failure and refusal of the railroads to provide the facilities and perform the services included in their common carrier obligation resulted in unreasonable rates and charges for the complete transportation service. This proposition does not depend upon whether the railroads unlawfully failed and refused to make an allowance for wharfage and handling services on the Government's traffic that moved over Army Base piers, but rests on the contention that when the Government paid the railroads' export rates and also bore the expense of providing wharfage and handling services on its traffic, the payments to the railroads plus the wharfage and handling expenses resulted in rates and charges in excess of those which lawfully could be charged on the traffic in accordance with traditional criteria.

The Commission dismissed the Government's complaint. The Government, the appellant here, contends that the Commission's order dismissing its complaint is vitiated by errors of law and mis-

public commercial piers are transportation provided by them for the shippers." (R. 93). It seems clear that if, as the Commission found, wharfage and handling services are "transportation" at the public piers, they are transportation facilities and services included in the common carrier obligation. If wharfage and handling services are transportation facilities and services, the railroads' legal duty to provide such facilities and services is, we submit, no less or different than their legal duty to provide line-haul service.

The Commission's conclusion that providing the piers and handling services on export traffic delivered to water carriers is not included in the common carrier obligation is inconsistent with its finding as to the experience of the railroads in transporting such traffic. Here the Commission found that for more than 50 years it had been the general practice of railroads serving North Atlantic ports, including Norfolk, to unload from car to pier water-borne freight which the carriers transport by rail to the ports (R. 74). Specifically, the Commission found that the Pennsylvania Railroad Company entered into a contract in 1925 with Norfolk Tidewater Terminal, Inc., then the lessee and operator of the Army Base piers, in order to provide pier facilities and handling services for shippers (R. 75). The fact that the railroads referred to wharfage and handling services in their tariffs demonstrates that they are trans-

application of the statutory standards prescribed by Congress (*United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489) and that it also lacks the requisite "rational basis." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

A. WHENEVER A COMMON CARRIER ACCEPTS GOODS FOR TRANSPORTATION TO POINTS BEYOND THE TERMINATION OF ITS LINE, THE CARRIER IS UNDER A LEGAL DUTY TO PROVIDE THE FACILITIES AND SERVICES NEEDED IN ORDER TO DELIVER THE TRAFFIC SAFELY TO ITS CONNECTING LINE.

The Commission concluded that it is neither the legal duty of railroads to provide piers nor to load or unload carload freight under the circumstances disclosed by the record in the proceeding before the Commission. The Commission's order of dismissal, here attacked, was predicated upon its conclusion that the railroads were under no legal duty to provide the piers and handling services on export traffic required to deliver the Government's export traffic to vessels for transportation to overseas destinations.

This conclusion appears to be erroneous as a matter of law. It has long been established at common law that whenever a common carrier accepts goods for transportation to a point beyond the termination of its line, the carrier is under the legal duty to deliver the traffic safely to its connecting line, whether a rail or water carrier. This duty arises from the obligation

implied in receiving for transportation goods shipped to destinations beyond the line of the receiving carrier. *Myrick* v. *Michigan Central Railroad Company*, 107 U. S. 102, 106;[21] *Texas & Pacific Railway Company* v. *Reiss*, 183 U. S. 621, 626; *New York Central Railroad Company* v. *The Talisman, Long Island R. Co.*, 288 U. S. 239, 241. It also has long been well established that whenever a common carrier accepts for transportation export traffic for delivery to a connecting water carrier, the common carrier thereby assumes the legal duty to provide adequate facilities needed to accomplish delivery of such traffic. *Galveston Commercial Assoc.* v. *A., T. & S. F. Ry. Co.*, 25 I. C. C. 216, 228; *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47, 53.

The Commission attempted here to make a distinction between the railroads' practice of providing wharfage and handling services at so-called public piers and their practice with respect to providing such facilities and services at private piers. In that connection, the Commission found that "The wharfage and handling at the defendants'

[21] As indicated by the Court's opinion in the *Myrick* case, *supra*, the legal duty to forward traffic safely to connecting lines does not rest upon any obligation to transport, or arrange for transportation of, the traffic to its ultimate destination. Such an obligation exists only where it is specifically assumed and, of course, the initial carrier's liability for loss or damage to the goods at points beyond its line depends upon the responsibility it has assumed specifically, a question not presented here.

portation facilities and services, utilized for the movement of export traffic to its ultimate destination overseas. Cf. Section 6 (1) of the Interstate Commerce Act (49 U. S. C. 6).

Moreover, the Commission's conclusion regarding the railroads' legal duty under the circumstances here appears to be inconsistent with its failure to condemn the railroads for providing wharfage and handling services over other piers not only at Norfolk but also at other North Atlantic ports as a part of the transportation service covered by their rates. The Commission's failure so to condemn the railroads is sharply at variance with its condemnation of carriers for performing or making allowances for other services held not to be included in the common carrier obligation, such as switching services within industrial plants. See *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11. As Commissioner Splawn stated in his dissent (R. 112), "If the principles announced in that proceeding [*Propriety of Operating Practices—Terminal Services, supra*] were applicable at Norfolk when the Army operated its piers, they were and are equally applicable at Norfolk, when the Army piers were and are operated by a private corporation, and at all other ports, but neither the majority report nor defendants suggest that such services and absorptions be discontinued."

The arbitrary character of the Commission's conclusion that wharfage and handling services are not included in the common carrier obligation of railroads is further illustrated by the fact that, in determining the fair value of the property upon which railroads are entitled to earn a fair return from transportation and the expenses incurred in rendering the transportation services assumed in their tariffs, the Commission has permitted railroads to include, for rate-making purposes, the value of piers in their statement of capital devoted to transportation services and the cost of operating the piers in their operating expenses. *Charges for Wharfage, Handling, Storage, and Other Accessorial Services at Atlantic and Gulf Ports,* 157 I. C. C. 663, 695. Nor should the fact that steamship lines also utilize piers serve to confuse determination of the question whether wharfage and handling services are included in the common carrier obligation of railroads. There is a distinction between wharfage and dockage. Wharfage denotes use of the surface of piers for the receipt, delivery, and handling of cargo, whereas dockage indicates the use of piers by vessels as a mooring place. See *Charges for Wharfage, Handling, Storage, and Other Accessorial Services at Atlantic and Gulf Ports, ibid.,* p. 672.

Here the Commission conceded that providing handling services is included in the common car-

rier obligation where freight "is to be transshipped by the railroads or their agents" (R. 102). This concession would seem to support the contention made by appellant here, that providing wharfage and handling services is a transportation service to be provided by the railroads where export traffic is accepted by them for transportation to points overseas. All of the traffic involved in this controversy was accepted by the railroads for transportation to shipside at Norfolk, Virginia, with knowledge of the fact that it was to be transported by vessel to overseas destinations beyond Norfolk (R. 405).

Accordingly, it is submitted that the Commission's conclusion that wharfage and handling services are not included in the common carrier obligation of railroads is erroneous as a matter of law and vitiates the Commission's order dismissing the Government's complaint.

B. THE COMMISSION ERRED AS A MATTER OF LAW IN HOLDING THAT THE RAILROADS' TARIFF PROVISIONS, INCLUDING IN THE RATES WHARFAGE AND HANDLING SERVICES, BECAME MEANINGLESS AFTER JUNE 15, 1942

As heretofore noted, the Transport Trading and Terminal Corporation was the lessee and operator of the Army Base piers immediately prior to June 15, 1942, when they were taken over by the Government (R. 102). Prior to June 15, 1942, and for extended periods thereafter, the

railroads' tariffs provided that wharfage and handling services at the piers of the Transport Trading and Terminal Corporation would be included in the rates applicable to export traffic transported by the carriers to Norfolk for export (R. 84, 89). Some of those tariff provisions remained unchanged nearly four years after the Government acquired possession of the Army Base piers (R. 89).

For example, the tariff of the Virginian Railway Company, one of the defendant railroads before the Commission, provided for absorption of wharfage, handling and terminal charges in words representative of the tariffs of all the railroads serving Norfolk (R. 426, 109):

> *At* Lincoln Tidewater Terminals, Inc., Transport Trading and Terminal Corporation, or Southgate Terminal Corporation (Portsmouth Division Terminals).
>
> Wharfage, handling and terminal charges, as published in Norfolk and Portsmouth Belt Line Railroad Tariff No. 6–J, I. C. C. No. 105 will be included in the transportation rates applicable to or from Norfolk, Va., on the following traffic moving in connection with the Virginian Railway *through the above terminals.* [Italics supplied.]

Although the Commission held that such a tariff undertaking establishes a legal duty to provide the handling services so specified in tariffs

(R. 102), the Commission sustained the railroads' contention that their tariffs providing for absorption of wharfage and handling service charges were not applicable to export traffic moving through the Army Base piers on and after June 15, 1942, the date upon which the Government assumed control of the piers, for the reason that, "In order to sustain the complainant's contention, therefore, it would be necessary to read into the tariffs words which were not there." (R. 103.) The Government contended before the Commission that the railroads, having so bound themselves to provide wharfage and handling services, were required by law either to make an allowance where the Government provided those facilities and services or to provide them at no additional expense to the Government. The Government's contention was that the railroads had violated the Interstate Commerce Act when they failed and refused to make adequate provision in their tariffs for such an allowance.

The Commission's interpretation of the railroads' tariffs involved no determination of fact. Thus, only a question of law was presented. Tariff provisions are to be construed strictly against the carrier and any doubt resolved in favor of the shipper. *Chicago & N. W. Ry. Co.* v. *Wilcox Co.*, 68 F. 2d 883 (C. A. 7), certiorari denied, 293 U. S. 560; *Union Wire Rope Corporation* v. *Atchison, T. & S. F. Ry. Co.*, 66 F. 2d

965 (C. A. 8). See also, *Raymond City Coal & Transportation Corporation* v. *New York Cent. R. Co.*, 103 F. 2d 56, 57 (C. A. 6); *Southern Pacific Co.* v. *Lothrop*, 15 F. 2d 486 (C. A. 9), certiorari denied, 273 U. S. 742.

The Commission expressed the opinion that cancellation of the lease of the Army Base piers to Transport Trading and Terminal Corporation on or about June 14, 1942, operated so as to make retention of the reference to the facilities of the Transport Trading and Terminal Corporation in the tariffs meaningless on and after June 15, 1942. The fallacy in the Commission's reasoning is clearly exposed by the dissent of Commissioner Splawn (R. 109):

> A corporation may own, lease, or operate wharfage facilities, but certainly it is not a terminal and traffic cannot be delivered at or through it. The question is whether the tariffs should be construed in favor of the carriers as being meaningless and of no force and effect, as is done in the report, or in favor of the shipper as designating by the name "Transport Trading and Terminal Corporation" the Army piers as facilities over which the shipside rates applied and at which defendants would absorb the wharfage and handling charges, as was found by Division 2. The latter is the reasonable interpretation, for it permits the export rates to be applied and absorptions

made in accordance with the holding out in the rate tariffs. Defendants themselves must have so interpreted the tariffs when they paid allowances to the Norfolk Tidewater Terminals, Inc., from September 1, 1925, to December 1925 and later dates, although its name was not then mentioned in the tariffs.

The record here shows that the railroads' practice in designating piers in the tariffs was to indicate them as points and that they generally used the words "at" and "through" in referring to the facilities at which wharfage and handling services either would be absorbed or included in the rates applicable to export traffic (R. 84). Thus, for periods ranging from a few months to ten years from September 1, 1925, when Norfolk Tidewater Terminal Inc. operated the Army Base piers, they were referred to in the railroads' tariffs as municipal terminals, which identification resulted from the fact that previously the Army Base piers had been operated by the City of Norfolk (R. 84).

It is submitted that both the language used by the railroads in their tariffs and their long-standing construction of the tariffs demonstrate that the Commission's interpretation of the words in those tariffs was clearly erroneous as a matter of law.

C. THE COMMISSION'S CONCLUSION THAT THE GOVERNMENT'S CONTROL OF THE ARMY BASE PIERS JUSTIFIED THE RAILROADS IN TREATING THOSE PIERS AS PRIVATE PIERS LACKS A RATIONAL BASIS

When the Government succeeded to control of the Army Base piers on or about June 15, 1942, it retained the existing organization of the Transport Trading and Terminal Corporation, the last lessee and operator of those piers; performed the handling services with the same civilian employees, and under the same supervisory force; and conducted the pier operations in the same manner as the Transport Trading and Terminal Corporation had performed them (R. 78). There was no change in the loading and unloading operation (R. 78). The railroads' shipside rates continued to be applicable to the Government's and other shippers' traffic which moved over the Army Base piers on and after June 15, 1942 (R. 91). The railroads, through their wholly owned Belt Line subsidiary, continued to switch export traffic to the Army Base piers (R. 78).

As heretofore noted, the Government, through the War Department, initially sought from the railroads an allowance for wharfage and handling services on its traffic that moved over the piers on and after June 15, 1942 (R. 80). But the railroads refused to make any such allowance (R. 80). They attempted to justify their refusal

on the ground that "where control or operation of piers or other facilities is taken over by the Government for its own use or they are operated under contract with the Government and under Government supervision, such facilities should be treated the same as piers operated or controlled by the owners of the property transported, and loading and unloading should not be performed by the carriers, nor any allowance made in lieu thereof" (R. 80).

The Commission failed to find specifically that assumption of control of the Army Base piers by the Government converted them from public to private piers. Likewise, the Commission made no specific finding that the railroads were justified in treating the piers as private piers by reason of the control exercised by the Government. However, the Commission found that the railroads "distinguish between traffic moving over private and public or railroad owned piers" (R. 94), and it quoted extensively from its decision in *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463, 472. In the *Weyerhaeuser* case, *supra*, the Commission said, "The reasons for this policy [refusing to load and unload freight over private piers] are the difficulty of policing the practice, the necessity of performing the handling at the rail carriers' own convenience, the economy resulting from the concentration over a limited number of piers, and

the conservation of revenue." (229 I. C. C. 473.) As disclosed by the Commission's report (229 I. C. C. 473), the standards thus established clearly are applicable only where the facilities and services provided by the railroads at other piers are adequate, a situation which was not present at Norfolk during war time.

Moreover, the standards relied upon by the Commission appear not to be pertinent to the issues presented by the Government's complaint. Thus, the Commission made no finding that there was any need to police the Government's traffic moving over the Army Base piers, nor was there any evidence from which the Commission could have made any such finding. Normally traffic is policed in order to preclude misapplication of certain rates to traffic which under the railroads' tariffs, properly should be assessed higher rates. Further, the Commission made no finding, and there was no evidence which would have justified any such finding, that the railroads would have been precluded from policing the Government's traffic moving over the Army Base piers if they deemed it necessary for their protection.[22]

[22] In fact, the record shows (R. 405) that the railroads considered their policing rules to be unnecessary and unreasonable under wartime conditions on traffic moving over the Army Base piers and provided that such traffic would not be subject to those policing rules. See also, *Peden Iron & Steel Company* v. *Texas & New Orleans Railroad Company, et al.*, 264 I. C. C. 769, 772–3.

Likewise, the Commission failed to make any finding which reasonably could be construed to show that control of the Army Base piers by the Government would have interfered in any substantial way with handling the Government's traffic at the railroads' convenience. Moreover, any necessity for performing the handling services at the railroads' convenience during normal times would seem to give way to the statutory duty of the railroads to adopt every means within their control to facilitate and expedite military traffic (Section 6 (8) of the Interstate Commerce Act (49 U. S. C. 6)).

There was no proposal before the Commission that the railroads make an allowance for wharfage and handling services or provide service over piers not previously utilized for that purpose by the railroads. Accordingly, making an allowance for wharfage and handling services or providing those facilities and services on the Government's traffic would not have required the railroads to forego any economy which they enjoyed prior to June 15, 1942.

Correspondingly, the standards with respect to conservation of revenue appear to have no relevancy to the Government's complaint, as making an allowance for wharfage and handling services or providing the facilities and services on the Government's traffic would have left the railroads in precisely the same financial position on traffic

handled over the Army Base piers on and after June 15, 1942, that they enjoyed with respect to similar traffic handled over those piers prior to that date. Moreover, to have granted an allowance for wharfage and handling on the Government's traffic which moved over the Army Base piers or to have provided wharfage and handling services on such traffic themselves, would have left the railroads' net revenues substantially the same as those derived by the carriers from traffic handled over all other piers, not only in the Norfolk port district but also in all other North Atlantic ports.

Further, according an allowance for wharfage and handling services to the Government or providing those facilities and services on the Government's traffic would not have established a precedent which would have offered any threat to the railroads' revenues. Operators of purely private piers could not satisfy the tests established in the *Weyerhaeuser* case, *supra,* so that they could not complain if wharfage and handling services were accorded on the Government's traffic moving over the Army Base piers and denied to the private pier owners in the absence of a showing that the facilities and services afforded by the railroads on their traffic were inadequate. See the Commission's report in the *Weyerhaeuser* case, 229 I. C. C. 463.

Control of the Army Base piers by the Government on and after June 15, 1942, clearly did not convert them from public to private piers. Commercial traffic moved over the piers to the maximum extent compatible with the prompt and expeditious movement of military freight (R. 79). Approximately 700 carloads of commercial freight moved over the Army Base piers between June 15, 1942, and July 18, 1944 (R. 79).

The arbitrary character of the Commission's conclusion that the control of the Army Base piers by the Government on and after June 15, 1942, provides any basis for refusing to make an allowance for wharfage and handling services or to provide those facilities and services is illustrated by the Commission's prior decisions in substantially identical situations. Thus, in *Elimination of New York, N. H. & H. R. Pier Stations*, 255 I. C. C. 305, the railroad, by tariff amendment, proposed to relieve itself of its stated responsibility for the expense of loading and unloading freight interchanged with water carriers at certain piers in Boston and Providence, Rhode Island, including a pier owned and operated by the War Department and another leased by the Navy Department, on the ground that the piers were used to such an extent for military purposes that they no longer could be regarded as public piers open for general commercial traffic. There the Commission stated (255 I. C. C. at 308):

Respondent treated these piers for many years as some of its principal public port facilities at which commercial shipments were loaded and unloaded, that service being included in the line-haul rates. We are of the opinion that the circumstances upon which it now relies as justification for discontinuance of that service do not warrant the conclusion that the piers in question should at this time be treated as private piers.

Accordingly, we submit that the practice of the railroads with respect to making allowance for wharfage and handling services at private piers affords no rational basis for denying such allowances on the Government's traffic that moved over the Army Base piers on and after June 15, 1942.

D. THERE IS NO RATIONAL BASIS FOR THE COMMISSION'S CONCLUSION THAT CONTROL OF THE ARMY BASE PIERS BY THE GOVERNMENT RELIEVED THE RAILROADS OF THEIR OBLIGATION TO PROVIDE WHARFAGE AND HANDLING SERVICES

Although the Commission stated that the railroads were under no obligation to provide wharfage and handling services at the Army Base piers, which it deemed to be sufficient to relieve the railroads of all responsibility for their failure and refusal to provide those facilities and services, the Commission went on to hold that even if there were such an obligation, the railroads were relieved of such obligation by reason of the fact

that the Army Base piers were under the control of the Government on and after June 15, 1942 (R. 89–90). This conclusion rested upon the Commission's subsidiary conclusion that "anything but operation by the complainant was impractical" (R. 90).

The Commission's conclusion that anything but operation by the Government was impractical rested upon its additional conclusions: (1) that "all activities on the piers had to be supervised and coordinated by a governing head" (R. 90), (although the Commission failed to note the obvious fact that this was true in peacetime), (2) the railroads "would have been obliged to pool their activities and operate as a unit" (R. 90), and (3) "troops would have had to be used" (R. 90).

The invalidity of the Commission's conclusions clearly appears when they are measured against its findings. Thus, the Commission found that the Government "indicated a willingness to have the defendants do the work and to let them have its civilian force" (R. 90). The Commission's conclusion that "Troops would have had to be used, and obviously anything but operation by the complainant was impractical" (R. 90) should be compared with the Commission's finding that at the Lambert Point piers handling services were performed by both civilian and military personnel under civilian supervision (R. 77, 92). The Government de-

manded of each railroad, on November 9, 1943, that it "immediately take the necessary steps to fulfill completely its undertaking under line-haul 'ship-side' rates on water-borne traffic" (R. 386–387). This demand was made on behalf of the Government by the Commanding General of the Hampton Roads Port of Embarkation, at the height of hostilities, and thus necessarily reflected the judgment of a responsible military commander as to what was practical under the circumstances. Further, even though the Commission's subsidiary conclusions (*supra*, p. 83) might have provided a rational basis in peacetime for the ultimate conclusion that the railroads thereby were relieved of their obligation to provide wharfage and handling services, that conclusion certainly lacks rational basis as applied to wartime conditions. By the terms of Section 6 (8) of the Interstate Commerce Act (49 U. S. C. 6), the railroads were required to "adopt every means within their control to facilitate and expedite the military traffic." Those means were defined by the Commanding General of the Hampton Roads Port of Embarkation when he demanded of the railroads that they perform their tariff undertakings.

The Commission's reliance (R. 90) upon *Kingan & Co., Terminal Allowance*, 255 I. C. C. 531, and *John Morrell & Co., Terminal Allowance*, 263 I. C. C. 69, as support for its conclusion that the railroads were not under obligation to perform the handling services because they would have

been obliged to pool their activities and operate as a unit, also appears to lack substance as applied to the circumstances of the present case. The asserted absence of any such obligation under normal circumstances appears not to be important when, as here, the Government offered the railroads the same civilian force used by the Transport Trading and Terminal Corporation (R. 90), which the railroads previously had employed to perform the handling services. Further, even though it were to be conceded that carriers are not required to pool their activities under normal circumstances, their refusal to do so here should be measured against their war time duty to "adopt every means within their control to facilitate and expedite the military traffic."

Predicated upon its conclusion that "anything but operation by the complainant was impractical," the Commission decided that when a carrier is prevented from performing a transportation service by the election of the industry to perform it, and when the service of the carrier would not meet the needs and convenience of or be satisfactory to the industry, the carrier's duty to perform the service under the line-haul rate is discharged and there is no obligation resting upon it to make an allowance to the industry for performing the service, citing the rule established by the Commission in *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, 29.

Not only was there no factual basis for the Commission's conclusion that control of the Army Base piers by the Government prevented the railroads from performing their common carrier obligation, but also the rule invoked by the Commission was established to control rebating and rendition of gratuitous services, not included in the common carrier obligation, under the guise of providing transportation service, and not to relieve the railroads from providing facilities and performing services clearly included in the common carrier obligation, that is, to provide the facilities and services needed in order to safely deliver traffic to their connecting lines.[23] Finally and, in any event, the practicalities of Government operation certainly did not constitute a bar to an allowance by the railroads in lieu of the services.

The Commission also concluded that the railroads had discharged their transportation obligation when the cars were delivered to a storage yard approximately one mile distant from the Army Base piers (R. 76, 104–105). This conclusion also rested upon the Commission's basic premise that control of the Army Base piers by the Government prevented the railroads from making

[23] The law does not require a shipper to suffer from inadequate service where adequate facilities are available to provide the service. See Section 1 (4) of the Interstate Commerce Act (49 U. S. C. 1); also, see *Chesapeake & Ohio Railway Company* v. *Westinghouse, Church, Kerr & Co., Inc.*, 270 U. S. 260.

shipside delivery, in accordance with the practice prior to June 15, 1942. The fallacy in the Commission's conclusions in that respect is demonstrated by the fact that the Commission also found that the railroads provided a locomotive and crews to switch railroad cars to and from the piers (R. 78, 89, 104), a service which the railroads apparently conceded they were required to perform and for performing which the Commission found no reason to criticize the carriers.

E. THERE IS NO RATIONAL BASIS FOR THE COMMISSION'S CONCLUSION THAT THE RAILROADS DID NOT FAIL TO PROVIDE REASONABLE PIER FACILITIES UNDER THE CIRCUMSTANCES.

Although the Commission concluded that the railroads were under no obligation to provide wharfage and handling services on the Government's traffic that moved over the Army Base piers, it also concluded that "there is no showing that the defendants have failed to provide reasonable pier facilities, even assuming that they were legally bound to do so." (R. 93.)

The lack of a rational basis for that conclusion is shown by the Commission's finding that, "Some of the defendants serving Norfolk have piers at which the complainant's freight could be handled. According to a witness for the complainant, however, the capacity of those piers was sufficient to handle only 37 percent of the traffic that moved over the complainant's 2 piers in 1943." (R. 93.)

Even in peacetime the railroads found the other piers in Norfolk to be inadequate for their purposes and, hence, sought and secured the use of the Army Base piers (R. 76–77). The Commission found that during the war the Government's traffic increased tenfold (R. 77). Moreover, the arbitrary character of the Commission's conclusion that the Government made no showing that the railroads had failed to provide adequate facilities and services is illustrated by the fact that the Commission's findings show that the other piers in the Norfolk Port District either were fully utilized for other purposes or were inadequate to handle the traffic in controversy, because of the lack of modern equipment or some other reason. (R. 76–77, 99.)

Accordingly, it is undisputed that the railroads failed to provide adequate facilities and services. The Commission's conclusion simply does not square with its finding that "about 37 percent [of the Government's traffic] could have been handled over the piers just described if the Army Base piers had not been available." (R. 77.)

F. THE COMMISSION'S CONCLUSION THAT THE RAILROADS' FAILURE AND REFUSAL TO PROVIDE WHARFAGE AND HANDLING SERVICES OR TO MAKE AN ALLOWANCE THEREFOR WAS NOT UNJUSTLY DISCRIMINATORY LACKS A RATIONAL BASIS

Section 2 of the Interstate Commerce Act (49 U. S. C. 2) condemns as unjust discrimination

the collection from any person or persons of a greater or less compensation than the carrier collects "from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." [24]

Here the railroads collected from the Government the same rates for less service than they "contemporaneously accorded shippers at other ports and at other public pier facilities at the port of Norfolk" (R. 100), a result condemned by Section 2 of the Act. In other words, they collected a charge from the Government for facilities and services which they failed and refused to provide, but which they provided for other shippers at other piers at Norfolk and which was also provided to commercial, or private, shippers on

[24] The "circumstances and conditions" to which Section 2 refers are those which are incident to the transportation service rendered and not those which are extraneous thereto." *Grain Proportionals, Ex-Barge to Official Territory*, 248 I. C. C. 307, 316. See, also, *Wight* v. *United States*, 167 U. S. 512; *Interstate Commerce Commission* v. *Alabama Midland Ry Co.*, 168 U. S. 144; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Interstate Commerce Commission* v. *Baltimore and Ohio R. Co.*, 225 U. S. 326; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567.

traffic moving over the Army Base piers during the period here in controversy (R. 85–86).

In *Union Pacific Railroad Company* v. *Updike Grain Company, et al.*, 222 U. S. 215, the failure to pay Updike an allowance for the elevation of its own grain while paying Peavey & Co. (see *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42) such an allowance for elevation of grain, including its own grain and that of other shippers, was condemned as discriminatory and unreasonable. The statements made by this Court in that case appear to be equally applicable here (222 U. S. 219–220):

> When the service was rendered, the carrier received value for which it was bound to pay, whether performed by the owner of the grain or some other person hired for the same purpose. * * *
>
> The carrier cannot pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar service. To receive the benefits of such work by one elevator without making compensation therefor would, in effect, be the involuntary payment by such elevator of a rebate to the railroad company, for it would enable the railroad company to receive more net freight on its grain than was received from its competitor located on the railroad's tracks.

This Court's discussion of the questions presented in the *Updike* case clearly shows that it was concerned with the difference in treatment as between shippers, and that the shipper who received elevation on his grain at the Peavey & Co. elevator paid less for the total service than the Updike Grain Co. when it handled its grain at its own elevator.

The Commission refused to sustain the Government's charge that the unequal treatment here as between the Government and private shippers constituted unjust discrimination, contrary to Section 2 of the Act. In this connection the Commission said (R. 105):

> With respect to the allegation of unjust discrimination, the complainant asks to be treated the same as commercial or private interests. The defendants argue that when these two piers were taken over by the complainant on June 15, 1942, they became private piers to all intent and purpose. The defendants do not pay allowances to private shippers for wharfage or for handling export freight, and they do not perform that service on private piers. As indicated, the defendants are not legally bound to provide pier facilities. *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663, 174 I. C. C. 263. Notwithstanding that, they do have pier facilities at Norfolk the capacity of which is

> sufficient to handle almost four times the amount of normal shipments of the complainant. During the war, however, the complainant's traffic increased tenfold. The freight of other shippers at Norfolk which receives unloading service is not the like kind of traffic contemplated by section 2 of the act dealing with unjust discrimination, and if handled in the same manner as the complainant's freight the export rates would not apply, much less the accessorial service demanded by the complainant or an allowance therefor.[25]

The plain purport of what the Commission has said here is that even though a difference in treatment might be discriminatory under peacetime conditions,[26] as a norm, a "tenfold" increase in traffic would justify the carriers in according different treatment to like traffic on the ground that the increased volume of traffic would not be the "like kind of traffic contemplated by section 2 of the act." (R. 105.)

But it would seem elementary that the increased volume of the Government's traffic is not

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[25] The Commission apparently failed to consider the tariffs of the Official Territory railroads, for such tariffs made the export rates applicable not only to the Government's traffic moving over the Army Base piers, but also to the traffic of private shippers handled in the same manner (R. 405).

[26] As before pointed out, p. 88, *supra*, the carriers found their port facilities at Norfolk to be inadequate during peacetime, and utilized the Army Base piers to meet the needs of normal traffic.

a just ground for discriminatory treatment. Traffic does not become unlike merely because it moves in greater volume during a particular period.

Likewise, a difference in handling may not be applied as a standard to determine whether traffics are unlike. Thus, there is no "rational" basis for the Commission's statement that "The freight of other shippers at Norfolk which receives unloading service is not the like kind of traffic contemplated by section 2 of the act dealing with unjust discrimination, and if handled in the same manner as the complainant's freight the export rates would not apply * * *" (R. 105). Whether there was any difference in handling the export traffic of the Government and private shippers is to be tested by the proper application of the standard, "substantially similar circumstances and conditions," which is the basic question presented here under Section 2, and any alleged difference in handling has no relation to determination of the question whether the traffic of the Government and traffic of private shippers moved over the several piers at Norfolk were "like kind of traffic." The railroads made no contention before the Commission that different treatment was justified because the traffic were unlike, but they defended on the ground that the circumstances and conditions at the piers over which the handling services were

performed by them and at the Army Base piers after repossession by the Army on June 15, 1942, were not similar, the fallacy of which contention we have previously shown.

The proper application of Section 2, free from this confusion of ideas, was clearly demonstrated by Division 2. It found that the railroads paid a wharfage and handling charge of about 4 cents on export traffic handled over the pier of the Norfolk & Western at Sewall Point, about one mile north of the Army Base piers and known during the war as United Nations Depot, and that a similar allowance was made at the Lambert Point pier, both of which piers were also served by the Belt Line (R. 76–77). Based on these and other findings, Division 2's ultimate conclusion was (R. 85–86).

> that defendants' failure and refusal to furnish wharfage and perform handling in connection with complainant's traffic or to make an allowance to complainant in lieu thereof, while contemporaneously furnishing and performing them in connection with like traffic of other shippers moving through Norfolk, is and for the future will be unjustly discriminatory in violation of section 2 of the act * * *.

Hence, we submit that the Commission has misapplied the statutory standards established in Section 2 of the Act.

G. THERE IS NO RATIONAL BASIS FOR THE COMMISSION'S CONCLUSION THAT THE REFUSAL OF THE RAILROADS TO PROVIDE WHARFAGE AND HANDLING SERVICES DID NOT RESULT IN UNREASONABLE RATES AND CHARGES ON THE GOVERNMENT'S TRAFFIC

As heretofore noted, the Government's complaint before the Commission was predicated alternatively upon the proposition that the railroads' export rates, which included wharfage and handling services, were just and reasonable for providing the complete transportation service, and that the railroads' failure and refusal to provide the facilities and services included in their common carrier obligation resulted in unreasonable rates and charges for the complete transportation service.

But the Commission also determined that question adversely to the Government. This determination resulted from the Commission's conclusion "that the line-haul rates charged on this traffic were and are less than reasonable maxima, and that nothing has been added to them to cover the cost of wharfage and handling,"[27] and "as nothing has been added to the export rates here in issue to

[27] The witness for the Port of New York Authority, who had no interest in the merits of the controversy (R. 302), testified before the Commission (R. 302) that, "Of all these years during which freight rates were revised tariffs of the carriers continued to hold out to the public these lighterage services, also loading and unloading as included in the rates. Hence, it must be presumed that the freight rates were made to include the delivery to or receiving from steamships. In no sense

cover the wharfage and handling they are not above a reasonable maximum level when a reasonable charge for wharfage and handling is added [to them]." (R. 105, 108.) The Commission's conclusion that the export rates were less than reasonable maxima was predicated upon the fact that the export rates were less than the domestic rates to and from Norfolk (R. 105–106).

As Commissioner Splawn aptly stated in his dissent (R. 111):

> There is no inference or presumption that because export rates are lower than domestic rates that they are less than maximum reasonable rates. The maintenance of such export rates is so general that it may be said to be standard practice, and we have frequently prescribed them. Due to the port differentials, the export rates to at least three of the principal north Atlantic ports, New York, Philadelphia, Baltimore and Norfolk, are lower in every instance than the domestic rates, the exception being the port to which the domestic rate is treated as the key rate under that adjustment.

Moreover, apart from what was said by Commissioner Splawn, the evidence before the Com-

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is it a free service." Obviously the cost of wharfage and handling services provided by the railroads was included in making the rates, for the rates include the facilities and services and the railroads receive no other compensation on such traffic from shippers.

mission clearly shows that the railroads' export rates to Norfolk could not exceed other rates available to shippers to other ports if the carriers were to obtain a fair share of the available export traffic. In 1932, the Commission prescribed new domestic class rates (R. 285). This required adjustment of the export rates to all ports because they were higher than the new domestic rates (R. 285). The newly prescribed domestic rates to Baltimore became the new standard for export rates because of average shorter distances from inland shipping points to Baltimore than to the other North Atlantic ports and hence, under the newly prescribed scale of rates, lower rail charges on export traffic moving to Baltimore (R. 285). The newly prescribed domestic rates to Norfolk from competitive origins were substantially higher than the newly prescribed domestic rates to Baltimore, which required the railroads to establish export rates to Norfolk no greater than the domestic rates to Baltimore in order for the railroads serving Norfolk to secure any export traffic. For example, export traffic shipped from inland points, such as Chicago, could move through either Baltimore or Norfolk and, unless the Norfolk export rates were made no greater than the Baltimore domestic rates, the railroads serving Baltimore would have secured the export movement. Thus, the controlling factor with respect to the Norfolk export rates was the level of the newly

prescribed domestic rates to Baltimore (R. 298), not the newly prescribed domestic basis to Norfolk. In fact, a witness for the railroads described the Baltimore domestic rates as "a controlling factor in determining the *reasonableness* of" the Norfolk port rates (R. 298). [Italics supplied.]

The factor which caused the railroads serving Norfolk to establish export rates no higher than the newly prescribed domestic rates to Baltimore is illustrated well by the testimony of a witness for the Port of New York Authority. "The advantages of one port in rates operates to divert to that port traffic which would normally move, and in the past has moved, through New York." (R. 300). It seems clear that the maximum rates on export traffic to Norfolk under normal circumstances could be no greater than the newly prescribed domestic rates to Baltimore, for otherwise the railroads serving Norfolk, under normal conditions, could not have secured any export traffic moving from inland competitive points.

The southern railroads likewise were required to observe as maxima, rates no greater than the newly prescribed rates to Baltimore because, as a witness for the southern carriers testified, "Another exception is that from Ohio River Crossings, we have established rates which include the wharfage and handling charges to enable us to compete with the port of Baltimore. The rates

from the competitive territory are made the same as to Baltimore because the rates to that port include wharfage and handling charges." (R. 348.)

In addition, the record before the Commission shows that Section 4 of the Interstate Commerce Act (49 U. S. C 4), the long and short haul clause, operated so as to force the railroads serving Norfolk to observe the newly prescribed Baltimore rates as maxima on traffic upon which the southern railroads wished to impose additional charges for wharfage and handling services. Thus, a witness for the southern railroads testified that "it was found that the rates to Norfolk were higher when you added to them the wharfage and handling charge than the rates to Baltimore. So to clear up the departure under Section 4, the Commission required us to observe the Baltimore rates as maximum." (R. 352.)

Even the Commission recognized in this proceeding that the competitive situation is the controlling factor in determining the maximum rate level at which traffic will move through the port of Norfolk. "'For competitive reasons the defendants accord Norfolk the same export rates as Baltimore, Md., despite the substantially greater distances to Norfolk from important shipping origins." (R. 105.)

If rates are to be made in the light of their indispensable requirement that they must move

traffic where there is any traffic or be only paper rates, prohibitory of the movement, then there simply is no rational basis for the Commission's conclusion that the export rates plus a reasonable charge for wharfage and handling services would not exceed reasonable maxima, for the record shows that export traffic would not move through the port of Norfolk on that basis.[28] It is not enough that export rates are intrinsically reasonable. They must also be relatively reasonable. The Commission has condemned domestic rates prescribed by it as unjust and unreasonable for application to export traffic because the domestic rates were relatively higher than the export rates to competitive ports. *Albany Port District Commission* v. *Ahnapee & Western Railway Company,* 219 I. C. C. 151, 163–165. Cf. *Wyoming Coal Co.* v. *Virginian Ry. Co.,* 98 I. C. C. 488; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658. The Commission also held in the *Albany* case that the practical result of the failure of the railroads to absorb wharfage and handling charges is to add those charges "to the line-haul rates applying on Albany's port traffic" (219 I. C. C. 174). Export rates, like other rates, must not exceed "what the traffic will bear." *Livestock-Western District Rates,* 176 I. C. C. 1, 82–83.

[28] The Government made no charge to private shippers for wharfage and handling services on commercial traffic which moved over the Army Base piers, anticipating that the railroads would be required by the Commission to compensate the Government for those facilities and services (R. 179).

In the exercise of its power to prescribe just and reasonable rates, the Commission must give due consideration "to the effect of rates on the movement of traffic" (49 U. S. C. 15a), which means, of course, that rates which will not move export traffic are beyond reasonable maxima.

There are other reasons why the railroads' export rates plus reasonable charges for wharfage and handling services would exceed reasonable maxima. Thus, testimony before the Commission showed clearly that rates in excess of the export rates to North Atlantic ports would divert traffic from those ports to Montreal, New Orleans and other ports. (R. 318–319.) In other words, the port relationship in rates is extremely sensitive and any attempt to add the cost wharfage and handling services to those rates would place "Baltimore and other North Atlantic ports * * * at a competitive disadvantage with New Orleans and other southern ports, as well as Montreal and other Canadian ports with which the North Atlantic ports are in competition under normal conditions." (R. 319.) The Commission recognized the force of this fact (R. 97), but it disregarded this circumstance in making its determination that the export rates plus reasonable charges for wharfage and handling services would not exceed reasonable maxima.

We submit that there is no rational basis for the Commission's conclusion that the railroads' export rates plus charges for wharfage and handling serv-

ices would not exceed reasonable maxima where the record shows clearly that such treatment would divert traffic from Norfolk to other ports. On the contrary, it is submitted that the record here shows that the export rates established by the railroads, which included wharfage and handling services, were maxima.

CONCLUSION

For the foregoing reasons, it is submitted that the district court's judgment should be vacated and set aside and that the proceeding should be remanded to the Commission for further proceedings.

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FEBRUARY, 1949.

APPENDIX

The pertinent provisions of the Judicial Code as amended by the Urgent Deficieneies Act of October 22, 1913, 38 Stat. 208 (28 U. S. C. (1946 ed.) 41 (28), 43–47, 48; section numbers are to United States Code) are as follows:

§ 41. *Original jurisdiction.*—The district courts shall have original jurisdiction as follows:

(28) *Setting aside order of Interstate Commerce Commission.*—Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

§ 43. *Venue of suits relating to orders of Interstate Commerce Commission.*—The venue of any suit brought to enforce, suspend, or set aside in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such

transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment. (Oct. 22, 1913, ch. 32, 38 Stat. 319.)

§ 44. *Procedure in certain cases under interstate commerce laws; service of processes of court.*—The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 47, 47a, and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43, and 49 of Title 49, run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, ch. 32, 38 Stat. 220.)

§ 45. (*Judicial Code, section 209.*) *District Courts; practice and procedure in certain cases.*—The jurisdiction of the district courts of the cases specified in section 44 of this title, and of the cases and proceedings under sections 20, 43, and 49 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served

by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court. (Mar. 3, 1911, ch. 231, § 209, 36 Stat. 1149; Oct. 22, 1913, ch. 32, 38 Stat. 219.)

§ 45a. (*Judicial Code, sections 212, 213.*) *Special attorneys; participation by Interstate Commerce Commission; intervention.*—The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43, and 49

of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under

the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practices of equity courts of the United States. (Mar. 3, 1911, ch. 231, §§ 212, 213, 36 Stat. 1150, 1151; Oct. 22, 1913, ch. 32, 38 Stat. 220.)

§ 46. (*Judicial Code, section 208.*) *Suits to enjoin orders of the Interstate Commerce Commission to be against United States.*—Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. (Mar. 3, 1911, ch. 231, § 208, 36 Stat. 1149; Oct. 22, 1913, ch. 32, 38 Stat. 219.)

§ 47. *Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking.*—No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which

case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which the complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, ch. 32, 38 Stat. 220.)

§ 48. (*Judicial Code, section 211.*) *Suits to be against United States; intervention by United States.*—All cases and proceedings specified in section 44 of this title shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved. (Mar. 3, 1911, ch.

231, § 211, 36 Stat. 1150; Oct. 22, 1913, ch. 32, 38 Stat. 219.)

The pertinent provisions of the Interstate Commerce Act, as amended, are as follows:

Section 1, Paragraph (5) (a) of Part I of the Interstate Commerce Act:

> (5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. (49 U. S. C. 1 (5) (a).)

Section 1, Paragraph 6 of Part I of the Interstate Commerce Act:

> (6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt

receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. (49 U. S. C. 1 (6).)

Section 2 of Part I of the Interstate Commerce Act:

That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U. S. C. 2.)

Section 8 of Part I of the Interstate Commerce Act:

That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or per-

sons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fees, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. (49 U. S. C. 8.)

Section 9 of Part I of the Interstate Commerce Act:

That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the

trial of any criminal proceeding. (49 U. S. C. 9.)

Section 15, Paragraph (13) of Part I of the Interstate Commerce Act:

> (13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. (49 U. S. C. 15 (13).)

Section 15a, Paragraph (2) of Part I of the Interstate Commerce Act:

> (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest,

economical, and efficient management to provide such service. (49 U. S. C. 15a.)

Section 17, Paragraph (9) of Part I of the Interstate Commerce Act:

(9) When an application for rehearing, reargument, or reconsideration of any decision, order or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise. (49 U. S. C. 17 (9).)

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CLERK

No. 330

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OCTOBER TERM, 1948

UNITED STATES OF AMERICA, APPELLANT

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

I

THE JURISDICTIONAL ISSUES

A. *The right to sue the Interstate Commerce Commission.*—Contending that the United States could not properly name the Interstate Commerce Commission as a party defendant in this action, and that this suit was and is, properly, brought by the United States only against the United States, the railroad appellees place great reliance on statements in the majority committee report on the bill which became the Mann-Elkins Act, to the effect that the pre-existing right to sue the Commission was to be terminated by that Act (Br. 27–28, note 12, 49). But, in a case

raising a related problem, this Court has repudiated the majority Senate and House Reports as guides to the Congressional purpose in the bill as finally enacted, and has relied upon the minority reports and statements of minority Senators as indicative of the Congressional intention. *Interstate Commerce Commission* v. *Oregon-Washington Railroad and Navigation Co.*, 288 U. S. 14, 26.[1]

It is clear that the minority was intent upon maintaining the Commission as sole defendant. And while its view did not wholly prevail, the compromise adopted certainly permitted the joinder of the Commission as a party defendant. In this connection, the statements of Senator Elkins are particularly pertinent. Discussing the bill as amended by the opponents of the administration bill in the House, and which remained in that form as finally enacted, Senator Elkins said (45 Cong. Rec. 6390–6391):

> * * * As I understand the House Amendment provides that a party of record, a complainant of record before the Interstate Commerce Commission has a right to appear, the Interstate Commerce Commission continues a defendant all the way to the Supreme Court of the United States, and the United States is made de-

[1] See fn. 7, 288 U. S. 26, citing House Report No. 923, 61st Cong., 2nd Sess., p. 158, 45 Cong. Rec. 5524; Senate Report 355, Part 2, pp. 5, 6, 7, 61st Cong., 2nd Sess., 45 Cong. Rec. 4604, 4607, 4606, 6445, 6451, 6462.

fendant; that is, *the House amendment makes three defendants, as it were.* [Italics supplied.]

Senator Burkett voiced the middle-of-the-road approach which was most truly representative of the bill as finally enacted when he said (45 Cong. Rec. 6399):

> * * * I am ~~not~~ very particular whether these suits are, in name against the United States or against the commission, but I am very earnest in the proposition that the commission shall be the real party that is defending this action clear through to the end. I am not very particular whether the suit shall be called against the United States or against the commission. I think that is a difference without very much significance, but I am very insistent that the commission shall be in these cases and shall defend them clear through.

Appellee railroads concede that before adoption of the Mann-Elkins Act, suits to set aside orders of the Commission properly named the Commission as a defendant, and Section 22 of the Interstate Commerce Act (49 U. S. C. 22) provides that "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." The right to name the Interstate Commerce Commission as a defendant in such suits was not specifically forbidden or excluded in the Mann-Elkins

Act. On the contrary, the Act refers to "the Interstate Commerce Commission * * * and to such other persons as may be defendants in the suit" (28 U. S. C. 47), and under that Act the "Commission continues a defendant all the way to the Supreme Court." See Senator Elkins, *supra*.

Consequently, we think it clear that were the matter otherwise more doubtful than it is, Section 22 would remove all doubts as to the continued right to join the Commission as a party defendant in suits such as this.

B. *The right of the United States to sue.*—The railroad appellees attempt to distinguish *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671 and *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567,[2]

[2] The assumption of jurisdiction in these cases instituted by a wholly-owned government corporation is not to be denied significance on the ground, reiterated by the railroad appellees (Br. 40, 52), that the jurisdictional issue was not there raised or decided. In *Commissioner of Internal Revenue* v. *Estate of Bedford*, 325 U. S. 283, 285, this Court said:

"Even long continued practice cannot alter the limits within which Congress has bound the appellate jurisdiction of this Court. * * * *But such practice may be decisive in interpreting procedural ways which, as a matter of dialectic or abstract analysis, may appear dubious.*" (Italics supplied.)

Moreover, in the *Mechling* case, the brief for the Interstate Commerce Commission (No. 72, October Term, 1946, pp. 80–81) specifically and directly discussed, in connection with the obligation of the Commission to serve the United States with a notice of appeal, the right of the United States to bring suit to set aside an order of the Commission. It can-

on the ground that the Congressional authorization to the Inland Waterways Corporation to sue and be sued in its own name evidences a Congressional purpose to permit the Inland Waterways Corporation to sue the United States under the Urgent Deficiencies Act (Br. 41). But it was early established that the United States may sue in its own name (*Cotton* v. *United States*, 11 How. 228, 231; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *United States* v. *Chamberlin*, 219 U. S. 250), and the statute referred to merely put the child of the Government on equal terms with the parent insofar as the right to resort to the courts was concerned.

In this case, as in the *Inland Waterways* and *Mechling* cases, there is and was no doubt that the plaintiff was a proper party to the proceedings before the Commission. Section 13 (1) of the Interstate Commerce Act, 49 U. S. C. 13 (1). Under 28 U. S. C. 45a (see Appendix to our main brief, p. 106), it follows that the United States here, like the Inland Waterways Corporation in those cases, was entitled to bring suit to set aside the order of the Commission. This is made clear by Mr. Justice Brandeis' opinion for the Court in *The Chicago Junction Case*, 264 U. S. 258, 267–268:

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not be said, consequently, that the right of the United States and its instrumentalities to sue went entirely unnoticed in the *Mechling* case.

> The plaintiffs may challenge the order because they are parties to it. The Judicial Code, § 212 (originally the Commerce Court Act, June 18, 1910, c. 309, 36 Stat. 542), declares that any party to a proceeding before the Commission may, as of right, become a party to "any suit wherein is involved the validity of such order." The section does not in terms provide that such party may institute a suit to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order. * * * No case has been found in which either this Court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the Commission but did not do so, have been allowed to maintain such suits where the requisite interest was shown.

Those more recent instances in which a party before the Commission has been denied the right to institute suit to set aside the Commission's order are all cases, unlike this, in which the plaintiff could not allege a direct and immediate injury sufficient to give him standing. *Sprunt & Son* v. *United States*, 281 U. S. 249, 254–255; *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 486; *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632; *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 119–120.

Decisions like that in the *Moffat Tunnel League* case, *supra*, denying to an unincorporated voluntary association interested in the development of adequate transportation facilities the right to sue, made it necessary for Congress, in the Agricultural Adjustment Act, specifically to authorize the Secretary of Agriculture to bring suit to set aside an order of the Commission. Section 201 of the Agricultural Adjustment Act of 1938, 52 Stat. 36, 7 U. S. C. 1291. When, as here, the interest asserted is "more than a sentiment" (289 U. S. at 119), no such specific statutory authorization is required. The Congressional grant to the Secretary of Agriculture of authority to bring suit thus implies no denial of the right of the Government, as a shipper and not merely representing the "public interest" (7 U. S. C. 1291 (b)), to institute such proceedings (cf. Railroad appellee's brief, pp. 33–34); it constitutes, on the contrary, Congressional recognition that there are instances in which courts may appropriately decide cases in which two branches of the Government have opposing interests. Compare also *United States* v. *Public Utilities Commission of the District of Columbia*, 151 F. 2d 609 (C. A. D. C.), certiorari denied, 331 U. S. 816.

C. *Section 9 afforded no option to the United States in this case.*—In its principal brief (pp. 47–56), the Government has sought to show that when, as here, a shipper claims to have suffered

damages and the claim is one which raises questions which only the Commission can decide, it cannot exercise the option granted by Section 9 to sue on such claim in the courts, and is, hence, not to be denied judicial review on the ground that it has elected to abide by the administrative determination. The limitations provisions found in Section 16 (3) (b) and (c) of the Interstate Commerce Act, as substantially amended by the Act of June 7, 1924, 43 Stat. 633, put this beyond doubt. 49 U. S. C. 16 (3) (b) and (c).

Section 16 (3) (b), which is concerned with the "recovery of damages not based on overcharges" provides *only* for proceedings before the Com-

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Section 16 (3) provides as follows:

(b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within two years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

* * * * *

(g) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

mission. Section 16 (3) (g) defines "overcharges" "to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission" and it is evident that, in this case, the claim of the United States was "not based on overcharges". *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, 202. See also our principal brief, pp. 61–102. Thus the United States could only go to the Commission in this case. By contrast, Section 16 (3) (c) contemplates either an "action at law" or a "complaint filed with the Commission" when the proceeding is for "recovery of overcharges."

The House Committee reporting the bill which became the Act of June 7, 1924, substantially rewriting Section 16 of the Interstate Commerce Act, thus summed up the remedies available to shippers (H. Rep. No. 796, 68th Cong., 1st Sess., p. 1):

> The shipper can proceed by two methods: He can complain to the Interstate Commerce Commission or he can bring suit for damages. *In claims for reparation he makes complaint to the Commission;* and *generally, in claims for straight overcharges, he brings a court action* in the first instance to recover the amount due him for a charge which is in excess of the published tariff.

It is only in an overcharge situation that an election is afforded by Section 9.

The appellees insist, however that initial resort can be made to the Commission for the indispensable administrative determination which, if favorable to the petitioner, would then become the basis of a suit in a Federal district court. Were the petitioner to follow this procedure, it is clear, of course, that he would be required to exercise care not to accompany his prayer for the administrative determination with a prayer for damages, for such a step would constitute the election under Section 9 which, the appellees contend, forecloses review of the Commission's order in this case under the Urgent Deficiencies Act.

Support for the appellees' suggestion is sought to be drawn from this Court's language in the *Abilene* case, 204 U. S. 426, 442. This Court, in denying, under circumstances comparable to those here involved, the right "originally" and "primarily," to go to the courts, clearly was using those words to distinguish a suit initially instituted in a court for reparations under Section 9 from the procedure for enforcement of an order of the Commission awarding reparations under Section 16 (2) of the Interstate Commerce Act. 49 U. S. C. 16 (2). This Court's language in no way supports the appellees' strained reading of Section 9. In *Robinson v. Baltimore and Ohio Railroad Company*, 222 U. S. 506, this Court said (p. 511): "It is apparent that neither provision

[Sections 22 and 9] recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or state, in the absence of an appropriate finding and *order* of the Commission." [Italics supplied.] The order referred to by the Court in that case was a reparation order and could not be obtained except where the complainant before the Commission had sought damages. That step, of course, would constitute the election under Section 9 which the railroad appellees contend here forecloses judicial review of the Commission's order in this case.

The construction of Section 9 contended for by the Government in this case, that no independent right exists to resort to the courts initially in suits for damages involving administrative questions, finds substantial support in the dissent of Mr. Justice Pitney in *Mitchell Coal and Coke Company* v. *Pennsylvania Railroad Company*, 230 U. S. 247, 267. The majority of the Court in the Mitchell case did not dispute (230 U. S. 250, 256–7) Mr. Justice Pitney's analysis of the effect of the majority decision in cases involving administrative questions within the Commission's primary jurisdiction:

> Since the result reached by the court in these cases has the effect of virtually eliminating the option conferred by § 9 of the Interstate Commerce Act upon shippers aggrieved by unjust discriminations prac-

[1] See Brief for the railroad appellees, p. 60.

ticed by common carriers in violation of § 2 and 3—the option to "either make complaint to the Commission" or to "bring suit for the recovery of the damage" * * *; and since in this and in other respects aggrieved shippers are to be deprived, in very large measure, of the right of redress by private action at law conferred by § 8 and 9 for violations of § 2 and 3, I deem it my duty to express, somewhat at length, the grounds of my dissent.

Adoption of the procedure proposed by the appellees would be tantamount, as a practical matter, to denying resort to the courts. It is commonly known that proceedings before the Commission are lengthy and time-consuming and, hence, expensive. In this case, the proceeding before the Commission was instituted on April 15, 1944, and completed on July 25, 1947. The appellees apparently concede that after such a proceeding before the Commission, a shipper would be entitled under the Urgent Deficiencies Act, as interpreted by this Court in *El Dorado Oil Works* v. *United States*, 328 U. S. 12 (Railroad appellees' Br. 64; Commission Br. —), to judicial review of the Commission's orders denying relief. The suitor before the Commission, if successful in the review proceedings brought under the Urgent Deficiencies Act, would then return to the Commission for further proceedings before that body not inconsistent with the court's action. If successful before the Com-

mission, the matter would then be ripe for the institution of a suit in a Federal district court, which proceeding would carry with it all of the days and incidents of such litigation.

But prior to the institution of such a suit in a Federal district court, the two-year statute of limitations would normally have foreclosed resort to the courts. Section 16 (3) (c) of the Interstate Commerce Act, 49 U. S. C. 16 (3) (c). The railroad appellees, apparently anticipating that this circumstance would be brought to the attention of the Court, concede (Br. 61-62) that there is a hardship rule which would be applicable in cases where the period provided by the statute of limitations would expire while the proceeding before the Commission and proceedings to review the administrative determination were being conducted. To provide for this contengency, the appellees suggest that there is a right under such circumstances to institute an action in a federal district court for damages, and to insist that the Federal district court stay its hand while the proceedings before the Commission and courts convened under the Urgent Deficiencies Act are being completed. But that so-called "hardship" would be present in virtually every case, and the appellees' thus complete their circle of reasoning by insisting on primary resort to the courts in virtually all Section 9 cases. As shown in our main brief, however, this Court has made it clear that the

"hardship" cases are the exception and not the rule. (pp. 54-55).

To suggest, moreover, that the damaged suitor may make his election under Section 9 after the proceeding before the Commission limited to seeking an administrative determination, is concluded, is to argue in the face of the Commission's General Rules of Practice (49 F. R. 6399) which provide (Rule 1.32(b)): "Except under unusual circumstances, and for good cause shown, damages will not be awarded upon a complaint unless specifically prayed for, *or upon a new complaint by or for the same complainant which is based upon any finding in the original proceeding.*" [Italics supplied.] The Commission, interpreting Rule 1.32(b), has said: "The obvious purpose of the rule is to prevent piecemeal litigation" (*Nelson Fuel Company* v. *Chesapeake & Ohio Railway Company*, 120 I. C. C. 723, 728), and to insure that "the Commission and the defendants" shall be "fully and fairly put on notice as to the extent of the claims presented in, and necessarily connected with, the complaint. * * * It is obvious fairness that complainants be required to disclose their whole case * * * that unnecessary multiplicity of proceedings cannot be encouraged or even tolerated." *Virginia-Carolina Chemical Corp.* v. *Akron, Canton & Youngstown Railway Company*, 248 I.C.C. 519, 521. See, also, *Ohio Valley Refining Co.* v. *Seaboard Air Line Ry. Co.*, 174 I.C.C.

635; *Jackson Traffic Bureau* v. *Alabama & V. Ry. Co.*, 118 I.C.C. 217; *Mississippi Farm Bureau Truck Assn.* v. *A. & V. Ry. Co.*, 136 I.C.C. 619; *Oklahoma Portland Cement Co.* v. *Arkansas W. Ry. Co.*, 159 I.C.C. 207. Thus, it seems clear that the Commission would not permit any election under Section 9 after the proceeding seeking an administrative determination had been concluded.

II.

THE MERITS

A. *The scope of review.*—The railroad appellees contend (Br. pp. 66, 67, 89) that the attack made by the Government on the findings set forth by the Commission to sustain its ultimate conclusions constitutes an attempt on the part of the Government to persuade this Court to substitute its judgment for that of the Commission. We assert only that the findings put forth by the Commission in support of its conclusions are not adequate for that purpose. In our view, the appellee railroads are attempting to sustain the Commission's ultimate conclusions even though its subsidiary findings are not rationally related to those conclusions.

"The Commission is the fact finding body," not the court. *Florida* v. *United States*, 282 U. S. 194, 215. The Commission must not only make a "suitably complete statement" (282 U. S. 215) of the reasons for its ultimate conclusions but

also it must make "the basic or essential findings required to support the Commission's orders." *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510–511; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489. The purpose of this requirement is "to enable the parties and [the court] to understand, with a fair degree of assurance, why the Commission acts as it does." *Eastern Central Motor Carriers Association* v. *United States*, 321 U. S. 194, 209–210.

But compliance with this requirement is not the end of the matter, as the findings must supply the required "rational basis". *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287. Nor can rejection of the findings as inadequate be construed to mean that "the result the Commission has reached would not be sustained if a sufficient basis were supplied in the record." *Eastern Central Motor Carriers Association* v. *United States*, *supra*, p. 210. The proceedings before the Commission involved "mixed questions of law and fact." *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, 547. Irrelevant findings, like irrelevant evidence, are not enough to support the Commission's order. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 578. The Commission's findings must

shew the propriety "from the standpoint of justice and law, of the step asked to be taken." *New England Division's Case*, 261 U. S. 184, 200. The Government's contention here is that the findings on which the Commission relies do not meet that test.

There lurk in the brief filed by the railroad appellees suggestions that findings made by the Commission under Sections 1 and 2 of the Act (49 U. S. C. 1, 2) are beyond the scope of judicial review. But this Court has reviewed findings made under Section 1 (*New York* v. *United States*, 331 U. S. 284, 343) and Section 2 (*Baltimore & Co.* v. *United States*, 319 U. S. 1, 6–7; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 576-583). The fact is that all such findings, "so far as considered by this Court, have uniformly been held to be subject to judicial review." *Chicago Junction Case*, 264 U. S. 258, 265.

B. *The railroads made no concessions to the Government.*—There also lurk in the railroad appellees' brief suggestions that the Government, instead of complaining of the treatment accorded to it by the railroads, should be grateful to them for granting a concession on the Government's traffic (Br. 73–74, 85, 92–93). This Court should not be deceived by these suggestions. The Government paid to the railroads the same export rates on its traffic that moved over the Army Base piers during the period of Government control as

those paid by private shippers, and paid the same export rates as those paid by private shippers prior to June 15, 1942, and subsequent to July 3, 1946, when the piers reverted to private control. The difference was that the Government was required to bear the expense of providing wharfage and handling services on its traffic, whereas shippers prior and subsequent to the period of Government control of the piers were provided with wharfage and handling services at no expense to them.

The Commission has consistently condemned application of domestic rates to export traffic of private shippers where, by reason of wartime emergency conditions, it was unjust and unreasonable to require compliance with the policing rules in the railroads' tariffs, the waiver of which policing rules is asserted here to result in a concession to the Government. *Peden Iron & Steel Company* v. *Texas & New Orleans Railroad Company*, 264 I. C. C. 769, 772–773; *Gulf Carloading Co. Inc.* v. *Baltimore & Ohio R. Co.*, 266 I. C. C. 283; *General Carloading Co. Inc.* v. *Baltimore & Ohio R. Co.*, 266 I. C. C. 243; *Storage-in-transit on Artificial Rubber*, 266 I. C. C. 693; *Chrysler Corp.* v. *New York Central R. Co.*, 234 I. C. C. 755; *C. B. Fox Co.* v. *Gulf, M. & O. R. Co.*, 246 I. C. C. 561; *River Petroleum Corp.* v. *Yazoo & M. R. Co.*, 258 I. C. C. 1; *Mid-Continent Petroleum Corp.* v. *Illinois Central R. Co.*, 258 I. C. C. 422;

Products-from-Sweden, Inc. v. *Lehigh Valley R. Co.*, 263 I. C. C. 760.

The Government's traffic that moved over the Army Base piers was export traffic in the usual and ordinary sense. It is well established that neither temporary stoppage of traffic, storage or processing, nor the fact that the traffic is not moving on through bills of lading, destroys the character of export traffic, and converts it to domestic traffic. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 527. Moreover, neither the fact that the railroads do not publish through rates with steamship companies to foreign ports, nor the fact that the Commission's authority under Part III of the Interstate Commerce Act does not extend to transportation of export traffic beyond the ports, nor the fact that the railroads do not contract to deliver beyond the ports, all asserted by the railroads (Br. 84–85), should confuse the issue as to the true character of the Government's export traffic that moved over the Army Base piers during the period of Government control. The railroads modified their export tariffs so as to make their export rates applicable in most instances to both Government and commercial traffic that moved over the piers during that period (R. 398, 401–402, 405, 455), not only to Government traffic consigned to the United States. Export rates are in the nature of proportional rates and they apply only to export traffic destined to foreign points

beyond the ports, and they never properly apply to domestic traffic. *Texas & Pacific Railway Co.* v. *United States*, 289 U. S. 627, 634, 639.

C. *The Government is entitled to recover whether or not the rates were reasonable.*—The railroad appellees contend (Br. 69, 89) that there being no provision in their tariffs for making an allowance for wharfage and handling services provided by shippers, "damages could be awarded only on a showing that the Army had paid excessive charges" and "disposition of the issue arising under Section 15 (13) became dependent on findings that the charges were unreasonable or discriminatory under Sections 1 or 2." The Government contends that it is entitled to damages for the railroads' refusal to make an allowance for the railroad facilities and services provided by it on its export traffic without regard to the question whether the rates and charges on the traffic exceeded reasonable maxima or were discriminatory.

The fact that the railroads had made no provision in their tariffs for an allowance for wharfage and handling services may not be used as a cover to protect them from the consequences of violating their statutory duty to make an allowance for those facilities and services. In *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, *Union Pacific Railroad Company* v. *Updike Grain Company*, 222 U. S. 215, and *General American Tank Car Corp.* v. *El Dorado Ter-*

minal Co., 308 U. S. 422, the right of shippers to an allowance was determined in favor of the shipper without regard to the level of the rates paid on the traffic. Whether the rates and charges applied to the shippers' traffic exceeded reasonable levels or were discriminatory was not a factor in those cases. The condition to recovery of an allowance is that the shipper has provided a railroad facility or service included in the carrier's obligation, and "The shipper was then entitled, under the plain terms of § 15 (13), to be paid by the carrier a just and reasonable allowance for providing the facility" or the service. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. at 431.

Great Northern Ry. Co. v. *Sullivan*, 294 U. S. 458, 463, cited by the railroad appellees (Br. 89), is not in point here because only Section 1 was involved in that proceeding, and the case turned on the failure of the complainant to establish that the transportation charges paid by him for the complete movement there involved were excessive. Whether an allowance should be made to shippers for providing a railroad facility or service under Section 15 (13) is a legal matter, similar to storage-in-transit, not dependent on the level of the general rates. Cf. *Central Railroad Company of New Jersey* v. *United States*, 257 U. S. 247, 255, 257–258; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 582–583. The railroad appellees themselves state here (Br. 91)

that "The line-haul carriers, which make the rates, have no participation in the port services which are accorded or not, as the case may be, solely by the local lines at the port."

D. *The "plant-spotting" cases are not in point.*—The appellees rely heavily on the so-called "plant-spotting cases" in support of their contention that there was no obligation on the railroads to provide wharfage and unloading services in this case. The plant-spotting cases are not pertinent here because none of them involved the initial carrier's duty to forward through traffic safely to its connecting line. See our principal brief, p. 67. In fact, in one of those cases (*N. Y. C. & H. R. R. Co.* v. *General Electric Co.*, 219 N. Y. 227, 234), Judge Cardozo stated a rule which appears to be applicable here: "whatever is essential in order to complete delivery, the carrier must do. That is what it is paid for when it collects its regular rates. If it fails to make delivery, and the consignee through its own instrumentalities completes the work, an allowance is due." The railroads refused both to provide wharfage and handling services and to make an allowance in lieu thereof in this case on the ground that the Army Base piers should be treated in the same manner as private piers (R. 80), not because the Army could prevent them from making delivery to ships nor because delivery was not included in the rates.

CONCLUSION

The judgement of the court below should be reversed.

Respectfully submitted.

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MARCH 1949.

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No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1948

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE INTERSTATE COMMERCE COMMISSION, THE UNITED STATES OF AMERICA, THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA

STATEMENT OF THE INTERSTATE COMMERCE COMMISSION AS TO JURISDICTION

In the District Court of the United States for the District of Columbia

CIVIL ACTION NO. 4729–47

UNITED STATES OF AMERICA, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, DEFENDANTS

THE PENNSYLVANIA RAILROAD COMPANY, THE VIRGINIAN RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, AND NORFOLK SOUTHERN RAILWAY COMPANY, INTERVENERS

STATEMENT OF THE INTERSTATE COMMERCE COMMISSION AS TO JURISDICTION

The Interstate Commerce Commission does not contest the jurisdiction of the Supreme Court to review the judgment of the court below. Compare *United States* v. *Corrick*, 298 U. S. 435, 440.

The Commission contends, however, that the District Court correctly decided that it did not have jurisdiction because the Urgent Deficiencies Act does not authorize the United States to maintain this action. The Commission also contends that the District Court was without jurisdiction

for the additional reason that the Urgent Deficiencies Act does not authorize judicial review of an order of the Interstate Commerce Commission denying reparation for alleged past violations of the Interstate Commerce Act. *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Ashland Coal & Ice Co.* v. *United States*, 325 U. S. 840.

In the Supreme Court the Commission will urge, as it did in the District Court, that its order is lawful on its merits and should not be set aside. In making this contention the Commission will rely upon the principle that an appellee may defend the decree on any ground that appears in the record, even though the ground was not adopted by the court below. See *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435–436. In the District Court the United States as petitioner asked to have the order of the Interstate Commerce Commission set aside on the ground that the findings of the Commission were not supported by substantial evidence and that the order was arbitrary and contrary to law. The United States introduced in evidence before the District Court a certified copy of the record before the Interstate Commerce Commission. The United States as petitioner, the Interstate Commerce Commission, and the interveners briefed and argued the merits of the Commission's order before the District Court.

The praecipe filed by the United States, as appellant, did not designate the record before the Interstate Commerce Commission as a part of the record to be incorporated in the transcript of the record on appeal. It appears that the United States as appellant does not intend to ask the Supreme Court to pass upon the merits of the Commission's order in the event that the Supreme Court holds that the District Court had jurisdiction of the action. Presumably the United States, as appellant, believes that if the Supreme Court decides that the District Court had jurisdiction of this action the judgment of the District Court should be reversed, the case remanded to the District Court for a consideration of the question of the validity of the Commission's order and the lower court's determination of that question reviewed by the Supreme Court on a subsequent appeal.

The Commission suggests that the appellate jurisdiction of the Supreme Court should not be exercised in this piecemeal manner. The provisions of the Urgent Deficiencies Act show that it was the intention of Congress that suits to annul, suspend, or set aside orders of the Interstate Commerce Commission should be expedited both in the District Court and in the Supreme Court. See 28 U. S. C. 47 and 47a. Cf. *Capital Transit Co.* v. *United States*, 325 U. S. 357; *United States* v. *N. Y. Cent. R. Co.*, 272 U. S. 457. The Commission submits that the District Court

correctly concluded that it did not have jurisdiction of this action and that this appeal should be disposed of on that ground without reference to the merits of the Commission's order. But if on this appeal the Supreme Court should decide that the lower court had jurisdiction, we believe that the Supreme Court should then pass on the validity of the Commission's order. Accordingly, the Commission, acting under the provisions of Paragraph 2, Rule 10 of the Rules of the Supreme Court, has filed a counter-praecipe designating the record before the Interstate Commerce Commission as an additional portion of the record in the District Court that should be included in the record on appeal.

Respectfully submitted.

Daniel W. Knowlton

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SEPTEMBER 9, 1948.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4729-47.

UNITED STATES OF AMERICA,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Defendants,

THE PENNSYLVANIA RAILROAD COMPANY, THE VIRGINIAN RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, AND NORFOLK SOUTHERN RAILWAY COMPANY,
Interveners.

INTERVENERS' STATEMENT AS TO JURISDICTION

The interveners do not contest the jurisdiction of the Supreme Court to review the judgment of the court below. Compare *United States* v. *Corrick*, 298 U. S. 435, 440.

The interveners contend, however, that the District Court correctly decided that it did not have jurisdiction because

the Urgent Deficiencies Act does not authorize the United States to maintain this action. The interveners will also contend in the Supreme Court, as they did in the District Court, that the District Court was without jurisdiction for two additional reasons: (1) Because there is no justiciable case or controversy since the United States is both plaintiff and the indispensable party defendant and relief may be granted in this action only against the United States or its instrumentality the Interstate Commerce Commission; and (2) Because the Urgent Deficiencies Act does not authorize judicial review of an order of the Interstate Commerce Commission denying reparation for alleged past violations of the Interstate Commerce Act. *Standard Oil Co. v. United States*, 283 U. S. 235.

In the Supreme Court, the interveners will also contend, as they did in the District Court, that the order of the Interstate Commerce Commission is lawful on its merits and should not be set aside. In making this contention the interveners will rely upon the principle that an appellee may defend the decree on any ground that appears in the record, even though the ground was not adopted by the court below. See *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435-436. In the District Court the United States as petitioner asked to have the order of the Interstate Commerce Commission set aside on the ground that the findings of the Commission were not supported by substantial evidence and that the order was arbitrary and contrary to law. The United States introduced in evidence before the District Court a certified copy of the record before the Interstate Commerce Commission. The United States as petitioner, the Interstate Commerce Commission, and the interveners briefed and argued the merits of the Commission's order before the District Court.

The praecipe filed by the United States as appellant did not designate the record before the Interstate Commerce Commission as a part of the record to be incorporated in the transcript of the record on appeal. It appears that the United States, as appellant does not intend to ask the Supreme Court to pass upon the merits of the Commission's order in the event that the Supreme Court holds that the District Court had jurisdiction of the action. Presumably the United States, as appellant, believes that if the Supreme Court decides that the District Court had jurisdiction of this action the judgment of the District Court should be reversed, the case remanded to the District Court for a consideration of the question of the validity of the Commission's order, and the lower court's determination of that question reviewed by the Supreme Court on a subsequent appeal.

The interveners suggest that the appellate jurisdiction of the Supreme Court should not be exercised in this piecemeal manner. The provisions of the Urgent Deficiencies Act show that it was the intention of Congress that suits to annul, suspend or set aside orders of the Interstate Commerce Commission should be expedited both in the District Court and in the Supreme Court. See 28 U. S. C. 47 and 47a. The interveners submit that the District Court correctly concluded that it did not have jurisdiction of this action and that this appeal should be disposed of on that ground without reference to the merits of the Commission's order. But if on this appeal the Supreme Court should decide that the lower court had jurisdiction, we believe that the Supreme Court should then pass on the validity of the Commission's order. Accordingly, the interveners, acting under the provisions of Paragraph 2, Rule 10 of the Rules of the Supreme Court, have filed a counter-praecipe designating the record before the Interstate Commerce Commission as an additional portion of the record

in the District Court that should be included in the record on appeal.

Respectfully submitted,

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No. 330

In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, APPELLANT

v.

INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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INDEX

	Page
OPINIONS BELOW	1
STATUTES INVOLVED	1
QUESTIONS PRESENTED	2
STATEMENT	2
1. Commission Proceedings	3
2. Proceedings in the District Court	1
SUMMARY OF ARGUMENT	2
Jurisdictional	21
On the Merits	36
ARGUMENT	44
Jurisdictional	44
I. The Urgent Deficiencies Act, which, in providing for court review of Commission orders, requires that the suits be brought against the United States, neither contemplates nor permits the bringing of such suits by the United States	44
II. Appellant, having elected to bring and prosecute its claim for damages by complaint before the Commission, it was precluded by section 9 of the Act from thereafter resorting to the alternative procedure of a suit in a federal district court, whether regularly or specially constituted	56
III. The District Court was without jurisdiction for the further reason that the jurisdiction to enjoin and set aside orders of the Commission did not extend to orders of the Commission granting or denying claims for damages against the railroads	76

825996—49——1

ARGUMENT—Continued Page

On the Merits 90

I. The railroads' failure to supply wharves and perform handling service at Army Base Piers 1 and 2, or in lieu thereof to pay appellant allowances was not an unreasonable practice 90

II. The Allegation of Unjust Discrimination 100

III. The allegation that the railroads' failure resulted in inapplicable rates or tariff departures 105

IV. The allegation that the rates were unreasonably high 108

CONCLUSION 111

APPENDIX 82

TABLE OF CASES

Allison (George) & Co. v. United States, 12 F. Supp. 862; 296 U. S. 546 27, 66, 71, 76

Ashland Coal & Ice Co. v. United States, 61 F. Supp. 708, 325 U. S. 840 27, 58, 66, 71, 76

Atchison, T. & S. F. Ry. v. United States, 232 U. S. 199 14, 100

Atlantic Lumber Corp. v. Southern Pac. Co., 47 F. Supp. 511 58

Bartlesville Zinc Co. v. Mellon, 56 F. 2d 154 58, 81

Barringer & Co. v. United States, 319 U. S. 1 105

Bell Potato Co. v. Aberdeen Truck Line, 43 M. C. C. 337 76

Brady v. United States, 283 U. S. 804 32, 34, 64, 76

Chicago & A. Ry. Co. v. United States, 156 Fed. 558 16

El Dorado Oil Works v. United States, 328 U. S. 12 35, 83, 84

General Electric Case, 14 I. C. C. 237 16, 95

Globe & Rutgers Fire Ins. Co. v. Hines, 273 Fed. 774 25, 53

Great Lakes Steel Corp. v. United States, 81 F. Supp. 450 72, 89

Hooker v. Knapp, 225 U. S. 302 73

Hormel (Geo. A.) & Co. v. C., M. & St. P., 283 Fed. 915 33, 58, 75

Illinois Central R. Co. v. Pub. Utilities Comm., 245 U. S. 493 55

Lambert Co. v. Balto. & Ohio R. Co., 258 U. S. 377 55

Mitchell Coal Co. v. Penna. R. Co., 230 U. S. 247 32, 51, 76, 82

McCormick Warehouse Co. v. Penna. R. Co., 191 I. C. C. 727 93

Morrisdale Coal Co. v. Penna. R. Co., 230 U. S. 304 75

New York Central & H. R. R. Co. v. General Electric Co., 114 N. E. 115 16, 94

Procter & Gamble Co. v. United States, 225 U. S. 282 59, 73

Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11 16, 93, 98

	Page
Rochester Telephone Corp. v. United States, 307 U.S. 125, 31, 35, 63, 72, 83	
Southern Ry. v. Tift, 206 U. S. 428	76
Staley Mfg. Co. Terminal Allowance, 245 I. C. C. 383	96
Standard Oil Co. v. United States, 283 U. S. 235	27, 30, 58, 71
Terminal Warehouse v. Penn. R. Co., 297 U. S. 500	75
United States v. Aberdeen & Rockfish R. Co. et al., 269 I. C. C 141	3
United States v. Am. Tin Plate Co. et al., 301 U. S. 402	93
United States v. Griffin, 303 U. S. 226	55, 87
United States v. Idaho, 298 U. S. 105	54, 55
United States v. Public Utilities Comm., 151 F. 2d. 609	46
United States v. Wabash R. Co., 321 U. S. 403	93, 96, 98, 105
Weyerhauser Timber Co. v. Penna. R. Co., 229 I. C. C. 463	93

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OPINIONS BELOW

The opinion of the specially constituted District Court (R. 129) is reported in 78 Fed. Supp. 780. The reports of the Interstate Commerce Commission involved (R. 73, 87, 101) are reported in 263 I. C. C. 303, 264 I. C. C. 683 and 269 I. C. C. 141.

STATUTES INVOLVED

The pertinent provisions of the Urgent Deficiencies Act and Interstate Commerce Act are set forth in the Appendix.

QUESTIONS PRESENTED

1. Whether, in view of its requirement that suits to set aside orders of the Commission shall be brought against the United States, the Urgent Deficiencies Act may be said to contemplate or permit the bringing of such a suit by the United States.

2. Whether the United States, having elected to bring its claim for reparation before the Commission by complaint and having prosecuted such complaint to final determination, was not precluded by section 9 of the Interstate Commerce Act from thereafter resorting to the alternative procedure of a suit in a federal district court, whether regularly or specially constituted.

3. Whether the special procedure provided by the Urgent Deficiencies Act for suits to enjoin or set aside orders of the Commission is applicable to Commission orders in respect of claims for reparation.

4. Whether the Commission's action in denying the claim of the United States for an award of reparation was not supported by ample evidence and findings and in all other respects valid.

STATEMENT

This is a direct appeal from a final decree (R. 134) of a specially constituted district court dismissing, for lack of jurisdiction, a petition of the United States seeking the enjoining and setting aside of an order of the Commission,

whereby the Commission denied a complaint of the United States asking for an award of reparation against certain railroads serving the port of Norfolk, Va. *United States* v. *Aberdeen & Rockfish R. Co. et al.*, 269 I. C. C. 131.

1. Commission Proceedings

By its complaint (R. 144), filed with the Commission April 15, 1944, the United States alleged, in effect, that the railroads' failure to furnish the facilities (wharfage) and perform the services (unloading and loading of cars, para. VI) incident to shipside receipt and delivery of its export, import, coastwise and intercoastal freight at Army Base Piers 1 and 2, Norfolk, or, in lieu thereof, to pay it an allowance for its furnishing of such facilities and performance of services, was an unjust and unreasonable practice and resulted in rates that were unreasonable, unjustly discriminatory and otherwise unlawful. The prayer (para. XIV) asked the Commission to require the railroads "to establish and pay in the future to complainant an allowance in such amount as it shall deem to be just and reasonable compensation for furnishing the facilities and performing the services at Army Base Piers Nos. 1 and 2 * * * or, in the alternative, to establish and apply in the future separate wharfage and terminal charges for the services at Norfolk, Va., and corresponding reductions in the existing line-haul rates applicable on export, import, inter-

coastal, and coastwise traffic to and from Norfolk, Virginia." The prayer also asked for an award of damages on past shipments handled over the piers.

"It is neither the legal duty of the railroads to provide piers, which are essentially steamship facilities, nor to load or unload carload freight except in unusual circumstances, such as livestock, or freight that is to be transshipped by the railroads of their agents. When they obligate themselves to load or unload carload freight, the duty is established by tariff undertaking. In assuming that obligation with respect to export and import traffic, the carriers have restricted the practice to so-called public piers, that is, piers operated by railroads, steamship companies, or public wharfingers, and have excluded the so-called private piers, that is, piers operated by the owners of the freight." (269 I. C. C. 141, 142; R. 102.)

Similarly as at other Atlantic ports, there have long been piers at Norfolk used for water-borne traffic shipped by rail to or from that port, these being public piers of the kinds just described and including private piers, operated by the owners of the freight. And, similarly as at other Atlantic ports, while the railroads reaching Norfolk have, in connection with freight to be transshipped by them or their agents, accorded free[1] wharfage

[1] Free in the sense of there being no charge to the shipper therefor other than included in the export, import, or coastwise rate.

and free handling service (unloading of outbound freight to pier floor and loading of inbound freight from pier floor to car), they have limited the practice to the public piers and have not extended it to private piers operated by owners of the freight or even to public piers so far as freight owned by the pier operator is concerned (R. 91, 323). Originally the practice of according wharfage and handling free, that is, as a service included in the port rates,[2] was confined to railroad piers and although, as indicated, such practice has been extended to include municipal and other public piers operated by public wharfingers, it is still restricted in principle to railroad piers, in that, under contracts, the public pier operator, or wharfinger, acts as the railroads' agent (R. 304–305).

From the practice of according "free" handling, the carriers' tariffs, both at Norfolk and the other ports, except certain types of traffic,

[2] Meaning export, import, etc., rates. In railroad parlance, export and import rates are rail rates between inland points and the ports but apply only to "traffic which is on its way to (or from) some foreign country." Where this is not the case, as for example, where the movements from inland origins are to end at the ports, the rates that apply are called domestic rates. *Export and Domestic Rates*, 8 I. C. C. 214, 218. Ordinarily the export rates to a port are lower than the domestic rates, this being due, however, not to any less cost in moving the export traffic but to the sharp competition for such traffic between the railroads serving the respective ports. *National Lumber Exporters Asso.* v. *K. C. S. Ry. Co.*, 25 I. C. C. 78, 85; Cf. *T. & P. Ry.* v. *U. S.*, 289 U. S. 627.

namely, short-haul traffic where the rate is less than 10 cents, bulky and heavy commodities (exceeding 3 tons), liquid freight in tank cars and freight moving in open top cars, the latter being handled by ship's tackle (R. 107, 304–305). The statements hereinafter made as to the carriers' practice of performing handling service, or of absorbing the charges therefor, will be understood to be subject to those exceptions.

Two of the piers in the Norfolk port area, Army Base piers Nos. 1 and 2, were completed by the Army shortly after World War I and leased to private interests for commercial peacetime operations as public terminal facilities of the railroads. For several years prior to June 15, 1942, they were operated by the Transport Trading and Terminal Corporation as a public wharfinger and as agent of the defendants. By contract that corporation agreed to unload out-bound traffic from the cars to the pier floor and to load in-bound traffic from the pier floor to the cars whenever the defendants were obligated to perform that service. The defendants agreed to pay the terminal corporation a wharfage charge of 1 cent per 100 pounds and a handling charge of 3 cents per 100 pounds. The contract imposed duties upon that corporation with respect to that service; protected the defendants in the matter of collection of freight charges, improper delivery, and loss and damage claims and gave the defendants the right to police and verify the operations. The

latter also was required to give bond to protect the defendants against its failure to perform its duties (264 I. C. C. 683, 684, R. 88).

These arrangements (prior to June 15, 1942) of the railroads with the Transport Terminal Corporation [3] in respect of wharfage and handling were for the most part the same as the arrangements they had with other public pier operators at the port of Norfolk (R. 281). The names of such public pier operators, including the Transport Terminal corporation, were set forth in the tariff of the Norfolk and Portsmouth Belt Line Railroad [4] (called the Belt Line), the latter being owned by, and performing terminal services for,

[3] Transport Trading & Terminal Corporation, formerly operator of Army Base piers 1 and 2, will be referred to as Transport Terminal Corporation, this for purpose of brevity while at the same time keeping its identity distinct from the other terminal corporations mentioned in the record, particularly Norfolk Tidewater Terminal Corp., and the Lincoln Tidewater Terminal, Inc., the latter operating United Nations Depot 9 for the Government. (Ex. 28, pp. 1 and 2, R. 507–508.)

[4] One of the public pier operators, the Imperial Tobacco Co., handles its own traffic as well as that of the public, but, for its own traffic, it is not paid by the railroads either wharfage or handling charge (R. 329, 358; Ex. 28, R. 510). And this is the rule as to traffic owned by a public pier operator at the other ports as well as at Norfolk (R. 93, 323, 347). Other than the Imperial Tobacco Co., no public pier operator at Norfolk handles its own traffic (R. 351). Exhibit 28, p. 4, gives a list of the private industries, having deepwater piers with rail connections at Norfolk. These industries are not public pier operators, are not the agents of the carriers and are not paid allowances (R. 323).

the eight line-haul railroads reaching the port (R. 75, 88), four of which were official territory lines[5] and the other four, southern territory lines.[6] As applying between the piers of such public pier operators and important origins, the export, import and coastwise rates of the four official territory lines, except the Chesapeake & Ohio,[7] generally included or their tariffs provided for absorption of the charges for wharfage and handling[8] (R. 91). As to the southern lines, their

[5] The Pennsylvania, the Chesapeake & Ohio, the Norfolk & Western and the Virginian.

[6] The Atlantic Coast Line, the South Railway, the Seaboard Air Line and the Norfolk Southern.

[7] Generally stated, the C. & O's reasons for not absorbing wharfage and handling charges of the public pier operators were, apparently, that it had and operated its own piers and terminals at Newport News, which were adequate for its traffic and were not served by the other carriers. Cf. *Norfolk Port Comm.* v. *C. & O. Ry.*, 159 I. C. C. 169, 170. Sometime in 1942 these piers and terminals of the C. & O. were taken over by the Army and were operated by it under a contract, whereby the C. & O. paid the Government an allowance of 50 cents a ton for handling (R. 91, 172). With the Army's special consent, the C. & O. could bring in commercial freight, but, apparently, the consent was sparingly given (R. 182).

[8] The Belt Line (performing terminal switching for the line-haul railroads reaching Norfolk) published in its tariff charges for wharfage and handling the same in amounts as were charged by Transport Terminal Corporation and the other public pier operators at Norfolk, that is, 1 cent for wharfage and 3 cents for handling service. Generally, the owning lines provided for the absorption of such charges of

rates generally included "wharfage and handling only where the Baltimore, Md., rate basis applies and where competition requires it; for instance, from points in Central Freight Association territory" (R. 91, 348). As to origins in the South, there are few instances of rates to Norfolk which include wharfage and handling charges (R. 342, 348, 329–331).

Export and import traffic being highly competitive, the rail rates thereon to and from the ports participating in the traffic are usually made giving special consideration to the factor of competition. In the rate adjustment here particularly involved, Baltimore is the base port. Its port rates are generally the same as its domestic rates and thus take account of distance and related matters usually given effect in the level of rates. On the other hand, at Norfolk, although the distances to that port from important shipping origins are generally much greater than to Baltimore, the export and import rates accorded it are maintained by the carriers at the Baltimore level (R. 105–107), and are, in practically all instances, lower than the domestic rates to Norfolk (R. 92). And, since such domestic rates do

Transport Terminal Corporation and the other public pier operators by referring to the provision in the Belt Line's tariff with respect thereto (R. 91, 203). In railroad parlance, absorption of charges means the assuming and paying by the railroad of charges which the shipper would otherwise have to pay in addition to the rates—here the export, import, etc., rates.

not include wharfage or handling, the inclusion thereof in the Norfolk port rates, or the absorption of the charges, put the latter rates on a still lower level than the domestic basis.

Due to war conditions, the Government, on June 15, 1942, cancelled the lease to Transport Terminal Corporation and took over the management and operation of the Army Base piers for the movement of military traffic "almost exclusively export" (R. 88, 102, 173). The railroads were advised that the said terminals would be "operated and controlled by the War Department"; that it was intended to use them "for Government traffic only"; that circumstances, however, might "require the handling of commercial freight" and in either instance the War Department or its agency will perform all services" (Ex. 1, R. 369). As a result of the Government taking over the terminal and piers and their management and control, the traffic, when delivered in yards, or on tracks, designated by the Army, passed from the custody of the railroads into the possession of the Army, or Government, the owner of the traffic. In such circumstances, the traffic was not export in the usual sense and, except for a special tariff provision would not have been entitled even to the export basis of rates (R. 91, 103, 194, 288, 455). However, at

[9] The evidence shows that use of the piers for commercial freight was in fact closely restricted and very limited. (R. 179.)

the request of the Army and Navy,[10] the railroads had previously put in their tariffs a provision, emphasized both in the testimony of the Army and that of the railroads (R. 194–195, 288, 455), which provided substantially that the export rates will also apply on shipments consigned on bills of lading for export, destined to foreign countries and handled through Navy Yards, Navy Bases and Army Bases (R. 571, 578, 579, 634, 635, 547, 551). After the Army took back its Base piers at Norfolk this provision was applied by the railroads in according the low export basis of rates (R. 91, 93, 103, 105, 579, 634), but, as in effect stated by the Commission, the granting of one concession did not necessarily require the granting of the further concession of paying the Army the allowances demanded (R. 103, 93).[11]

As above said, the Army, when taking over the Base piers, definitely advised the railroads that they were to be operated and controlled by the

[10] See Interveners' Answer, Fourth Defense, para. 1 (R. 125) respecting correction in copy of Commission's report, shown as Appendix IV to the Complaint.

[11] The railroads refused to grant such allowances at any Naval or Army piers where the control or operation of piers or other facilities is taken over by the Government for its own use or they are operated under contract with the Government and under Government supervision (Ex. 1, R. 382). As to the Naval Base at Norfolk where the Navy was handling Navy traffic in the same way that Army traffic was handled through the Army Base: "No allowance has been sought and none is made." (Ex. 28, R. 510–511, 551, 625.)

War Department and that all services would be performed by the War Department or its agency. Moreover, while shortly thereafter, June 22, 1942, the Army wrote the railroads to amend their tariffs to provide for the absorption of wharfage and handling charges on Government traffic (Ex. 1, R. 365), that is, for "an allowance to the United States Government of one (1) cent per 100 pounds for wharfage and three (3) cents per 100 pounds for handling" (Ex. 1, R. 370), it was not until a year later, May 1, 1943, that the demand was changed to one for performance by the railroads of the service, such change being explained by the statement that it appeared that a request that the various carriers perform the services was a prerequisite to an action before the Commission. (R. 580, Ex. 1, R. 375.) Speaking of this, the Commission's report on reconsideration says:

> At first, the complainant sought an allowance for this wharfage and handling, * * *. Subsequently, the complainant indicated a willingness to have the defendants do the work and to let them have its civilian force, subject to observance of rules as to security, safety, fire, cleanliness, et cetera. The defendants could not have performed the service individually but would have been obliged to pool their activities and operate as a unit under the complainant's control. * * * In the instant proceeding, the complainant recog-

> nized that the civilian force was inadequate and that the defendants could not get the additional manpower needed to handle peak loads. Troops would have had to be used, and obviously anything but operation by the complainant was impractical * * *.

The above are findings of the Commission in the matters with which they are concerned, and certainly have, not only substantial, but full, support in the evidence.

As above stated, Transport Terminal Corporation, former lessee of the Army Base Piers, operated them as a public wharfinger and as agent of the railroads under contracts whereby they agreed to, and did, pay the charges of said corporation for wharfage and handling. This relieved shippers of the need of paying such charges, but, in principle, the situation was the same as if the railroads themselves supplied the facility and themselves performed the handling (R. 304–305). In contrast, the Army, after taking over the piers, did not act as agent of the railroads; nor has it ever claimed that it did. What it asked of the railroads was that they amend their tariffs so as to provide for an allowance [12] (wharfage and handling) to the Gov-

[12] Dealing with allowances, the Act (Sec. 15 (13)) provides substantially that, if the owner of property transported under the Act renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in the tariffs and shall be no more than just and reasonable,

ernment. Accordingly, when, after the lapse of a year, the Army changed its request to one asking the railroads to perform the service, coupled with the statement that that appeared to be a prerequisite to an action before the Commission, what the Army apparently then recognized was that the railroads could only be obligated to pay it an allowance for service being performed by it, if they, the railroads, were first requested, and afforded opportunity, to themselves perform such service.[13] But, in any event, as stated by the Commission, in the circumstances shown "obviously anything but operation by the complainant was impractical."

Moreover, with the taking over of the operation of the Base piers by the Army for military traffic and under its close control and management, the character of the facility and service involved underwent a complete change. Briefly outlined, the reports and evidence show that the Belt Line (performing terminal switching

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and the Commission may, after hearing, determine what is a reasonable charge as the maximum to be paid by the carriers for the service so rendered or for the use of the instrumentality so furnished.

[13] This is shown by the complaint filed with the Commission; for what was there complained of as unlawful (para. IX) was the railroad's failure to furnish the facilities and perform the handling service at the Army base piers, "or in lieu thereof to grant complainant an allowance for wharfage and handling." Whatever transportation service or facility the carrier is required to supply, it has the right to furnish. *Atchison, T. & S. F. Ry. v. U. S.*, 232 U. S. 199.

for the owning railroads) delivered cars of outbound freight at the "storage yard" and to some extent at the "north gate"; that it did this pursuant to prior instructions from the Army and on tracks designated by the Army; that, thereupon, the Army took possession of the shipments and controlled the movement beyond to the pier connection, operating several locomotives (with crews) of its own and one locomotive (with two crews) contributed by the Belt, but "all at the direction of the complainants' yardmasters" (R. 275–279); that the freight had to be handled according to priorities and various changing conditions confronting the Army, some cars having to be unloaded immediately whereas others were held a short time or the freight unloaded and stored on the piers or in warehouses; that frequently the Army had to load vessels day and night to meet a convoy deadline hour based on oversea calls; that all activities on the piers had to be supervised and coordinated by a governing head; that, as labor shortages developed, the Army assigned Italian service units to this work and sometimes stevedores to supplement civilian labor; and that, at the time of the hearing, the civilian personnel was only about one-half of the total number employed (R. 89–90).

In short, just as the Army advised the railroads to begin with, so it proved to be the case, that is, that the operation of the Army Base piers had to be and was conducted under absolute con-

trol and closely coordinated direction and supervision of the Army. Work done under such conditions is no part of carrier transportation; it is the shipper's own work. As stated by the Commission (R. 93–94):

> * * * The wharfage and handling at defendant's public commercial piers are transportation provided by them for the shippers. Providing a wharf and handling the freight at the complainant's piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property at his own convenience and expense before or after the transportation is performed. The defendants may not be required, therefore, to provide a wharf or handle the freight on the complainant's piers, and not being required to do so they are not compelled to pay an allowance in lieu thereof. *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11.

See also *General Electric case*, 14 I. C. C. 237, 242; *New York Central & H. R. R. Co.* v. *General Electric Co.*; 114 N. E. 115, 117 (opinion by J. Cardozo); *Chicago & A. Ry. Co.* v. *United States*, (C. C. of Apps., 7th Circ.) 156 Fed. 558, 561–562.

Appellant emphasized before the Commission that what it was asking was "that it be treated 'exactly as commercial interests' and that it should 'have the same rights and privileges that a private interest has'." In this connection, it contended

particularly that the railroads' said failure in respect of wharfage and handling incident to its traffic was unjustly discriminatory in violation of section 2 of the Act. Answering this, the Commission said (R. 92–93):

> * * * Section 2 of the act is to the effect that a carrier shall be deemed guilty of unjust discrimination if it receives from any person a greater or less compensation for any service rendered than it receives from any other person for doing him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. The defendants do not pay allowances to private shippers for wharfage or for handling export freight and do not perform the services on private piers. The freight of other shippers which receives the unloading service is not "like traffic," and if handled in the same manner as the complainant's freight the export rates would not be accorded it, much less the accessorial services. If anything, the complainant is being favored, but, of course, this is not unlawful under the circumstances. * * *.

The Commission's reports deal with certain other contentions made by appellant which will, however, be left for mention in the argument on the merits.

Copies of the Commission's three reports, appearing as appendices to the petition, are con-

tained in the record. The report of the Commission, Division 2, August 3, 1945, found that the railroads' failure to make the United States an allowance for wharfage and handling at Army Base Piers 1 and 2, Norfolk, or to themselves furnish the wharfage and handling, was an unreasonable practice and unjustly discriminatory in violation of sections 1 and 2 of the Act. The railroads were ordered to desist from such violations and reparation was awarded. (R. 73). Following reopening and reargument before the entire Commission, the Commission issued, May 3, 1946, its report and order on reconsideration, reversing Division 2, denying the award and dismissing the complaint (R. 87–98). Subsequently, following a second reopening and reargument, the Commission issued, July 25, 1947, a further report sustaining its findings and action last mentioned (R. 101). Near the close of the last report the Commission said (R. 108):

> During the argument we were advised by counsel for complainant that efforts are being made to have these two piers operated in a manner similar to that in effect prior to June 15, 1942. So that the purpose of this proceeding now is for reparation only.

2. Proceedings in the District Court

The petition of the United States, seeking the enjoining and setting aside of the Commission's order denying an award of reparation or dam-

ages, was filed November 20, 1947 (R. 66). The petition named the Commission as well as the United States as a defendant. December 20, 1947, the Commission filed an answer (R. 115), alleging as a first defense that the District Court was without jurisdiction to entertain the suit for the reasons (a) that a Commission order denying an award of damages is not reviewable in a specially constituted district court, and (b) that petitioner, having elected to bring and prosecute its claim for damages before the Commission, was precluded by section 9 of the Interstate Commerce Act from thereafter resorting to the alternative remedy of a suit in a district court, whether regularly or specially constituted. As a second defense, the answer alleged that the Commission's action denying the award was in all respects lawful and valid. January 13, 1948, the United States filed its answer (R. 118), alleging substantially that the Commission was a defendant in the suit, that it was authorized by law to defend its order without regard to the position taken by the United States as statutory defendant; and that, in the circumstances, the United States, as statutory defendant, neither admitted nor denied the allegations in the petition. March 2, 1948, certain of the railroad respondents in the Commission proceeding who had intervened as defendants in the court suit (R. 119–122), filed an answer (R. 123–128) setting up the same, or substantially the same, defenses as made in the

Commission's answer plus the following: (a) that the court was without jurisdiction because there was no case or controversy in view of the fact that the United States was both plaintiff and indispensable party defendant, and that relief could be granted only against the United States or its instrumentality, the Commission; and (b) that the court was without jurisdiction because the United States had no statutory standing to institute the suit.

June 28, 1948, the District Court rendered its decision (R. 129), holding substantially that, since the statute required that suits to set aside Commission orders be brought against the United States, and did not authorize the adding of the Commission as codefendant, it was confronted with an anomaly—a suit by the United States against the United States; that the United States was not a mere nominal defendant; that the principle that no person may sue himself was applicable to the United States; that such principle was but an application of the general doctrine that federal courts may deal only with actual cases or controversies; that, as to the suggestion of the United States that unless it might maintain the suit, it was without a remedy, such contention was hardly well founded since the statute (sec. 9, Interstate Commerce Act) gave it the alternative remedy of an election to bring suit against the common carriers directly in a federal district court; and that, under any circumstances,

it (the court) must enforce the will of Congress which clearly did not contemplate or intend to permit a suit by the United States against the United States to review an order of the Commission.

July 26, 1948, the District Court entered its final decree dismissing the petition. (R. 134.)

SUMMARY OF ARGUMENT

Jurisdictional

I

The District Court did not err in dismissing for lack of jurisdiction the suit brought by the United States to enjoin and set aside the Commission's order denying its claim for an award of reparation. Because of the statute's requirement that suits to set aside Commission orders shall be brought against the United States, the suit confronted the court with an anomaly—a suit as to which the United States was both plaintiff and defendant and which, therefore, was one presenting no actual case or controversy. And, while, in bringing the suit, the United States followed a procedure whereby, after adding the Commission as co-defendant, it filed on its own behalf a neutral answer, neither admitting nor denying the allegations of its bill, such procedure, which had the effect, among other things, of substituting the Commission for itself as *the* defendant of the suit brought, was neither con-

templated nor permitted by the statute, this being shown both by the provisions thereof and its legislative history.

The provision that suits to enjoin and set aside orders of the Commission shall be brought against the United States first appeared in the bill to create the Commerce Court, enacted into law in 1910. During the course of the passage of the bill, the provision was objected to by members of both houses who, being apprehensive that the Attorney General might not always vigorously defend the Commission's orders, favored the amending of the bill so as to provide that the suits be brought against the Commission and be defended by its own counsel. Attempts to amend the bill to so provide were made but were defeated, the only success attending the attempts being the securing of provisions authorizing, as matter of right, the Commission and any party in interest to a Commission proceeding to intervene in any such suit and to "prosecute, defend, or continue said suit * * * unaffected by any action or nonaction by the Attorney General."

Accordingly, since in face of strong opposition and attempted amendments which would have required that the suits be brought against the Commission, Congress deliberately enacted the provision requiring that the suits be brought against the United States, it is evident that the United States' said procedure in bringing the suit whereby it, in effect, substituted the Commission

for itself as the defendant of the suit brought, squarely conflicted with the statute as so deliberately enacted. Moreover, since Congress, dealing specifically with the Commission's status in the suits, deliberately and advisedly fixed such status as that, not of a defendant or co-defendant, but simply an intervener, it is further evident that even the first step in the United States' said procedure—that of naming the Commission as well as the United States a defendant in the bill it filed—was in conflict with the statute. So that, while, as apparently relied on by appellant (R. 119), it was not until after the Commission made answer to the bill, that the United States filed its neutral answer, it is not apparent that that fact changed the situation in the least. As in effect said by the District Court (R. 131), since the adding of the Commission as co-defendant was without warrant in law, the suit before it was nothing more nor less than a suit by the United States against the United States. Such being the nature of the suit, the Commission's answer to the bill can at best be regarded only as an intervention, but since, before the Commission could by intervention become a party defendant, a valid suit must have first been begun, it is to "place the cart before the horse" to urge that the Commission's intervention supplied the necessary actual defendant to make the suit valid.

Apparently, the thought of appellant United States that it may, as plaintiff, sue to set aside

a Commission order, if but naming the Commission as co-defendant and thereafter filing a neutral answer in its own behalf, rests largely on the fact that the Commission, when intervening as party defendant in a suit to set aside one of its orders, is authorized to continue the defense thereof "unaffected by the action or nonaction of the Attorney General." In this connection, the United States refers to a number of suits to set aside Commission orders which it declined to defend, or to further defend, either by similarly taking a neutral position or by answers or other action confessing error in the orders. But since the suits referred to were brought by plaintiffs other than the United States—for the most part carriers—it is evident that, even though, by its filed answers or other steps, the defendant United States declined to defend the orders, the suits were, when and as brought bona-fide suits against the United States, presenting for decision actual controversies between such plaintiffs and the United States. And that being so, it followed that the Commission and others interested could, by intervention, become party defendants and, once defendants, could continue the defense of the suits "unaffected by (the said) action or nonaction of the Attorney General." On the other hand, since here the suit against the United States to set aside a Commission order was brought by the United States as plaintiff and, since, too, by its very procedure in bringing

the suit—its procedure of adding the Commission as co-defendant and on its own behalf filing a neutral answer declining to defend—the United States seemingly recognized the incongruity of attempting to conduct the defense itself (*Globe & Rutgers Fire Ins. Co.* v. *Hines*, 273 Fed. 774, 777), it is equally evident that there never was instituted an actual suit against the United States as a real defendant—a defendant who it was ever intended should defend.

In fact, it seems plain that the said procedure was particularly designed to in effect eliminate the United States as defendant while supplying the Commission as a defendant in its place and stead; but, to consider that the United States could in this way gain standing to sue as plaintiff would be to assume that it might change the Commission's statutory status of intervenor to that of a defendant and in effect substitute the Commission for the United States as *the* defendant of the suit, whereas, as above pointed out, both such result and the intermediate step of changing the Commission's status of intervenor to that of co-defendant squarely conflict with the statute's provisions as confirmed by its legislative history. They also conflict with decisions of this Court, holding that the United States is an indispensable party defendant in suits to set aside Commission orders. And, while such holding does not mean that the Commission, when intervening in a suit validly brought, could not continue the defense

thereof unaffected by the United States' failure to defend, it does mean at the very least that, in order that a suit be valid at its inception or at any time, it must be a suit brought against the United States as a real, and not a mere nominal, defendant.

Although here the United States, in its capacity of defendant named in its bill, filed a neutral answer, it is difficult to picture it as truly neutral any more so in that capacity than in its capacity of plaintiff. Since the suit was brought by the United States and since, moreover, it was concerned with the recovery of money claimed to be due the United States, it seems clear that the United States' true position, though responding as defendant, would have been better reflected by an answer admitting the allegations of the bill it filed and joining in its prayer for relief. In any event, it is manifest that its position or views were such as to preclude it from filing answer, opposing the bill and asking that it be dismissed. In short, the very procedure and steps the United States found necessary to adopt in bringing the suit to set aside the Commission's order convincingly demonstrate that the suit was outside the scope of the Urgent Deficiencies Act and the District Court's jurisdiction.

II.

The suit of appellant United States seeking the setting aside of the Commission's order deny-

ing an award of damages was also outside and beyond the District Court's jurisdiction for the reason that appellant, having elected to bring its claim for damages before the Commission by complaint and, having proceeded to a final determination before that body, it was, by force of section 9 of the Interstate Commerce Act, precluded from seeking reparation upon the same claim by the alternative procedure of a suit in a federal district court. *Standard Oil Co.* v. *United States*, 283 U. S. 235, 241; *Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708, affirmed *per curiam*, 325 U. S. 840; *George Allison & Co.* v. *United States*, 12 F. Supp. 862, affirmed *per curiam*, 296 U. S. 546.

In the *Standard Oil case, supra*, a three-judge court case seeking the setting aside of a Commission order denying reparation, this Court sustained on three grounds the District Court's decree dismissing the suit for lack of jurisdiction, the third ground being based on section 9 of the Interstate Commerce Act, which provides that a claim for damages against a carrier may be brought before the Commission by complaint or by suit in a federal district court, but that the claimant shall not have the right to pursue both remedies, and must in each case elect which one of the two methods of procedure he will adopt. After stating that, since the appellant Standard Oil Company had elected to proceed before the Commission, it was precluded from resorting to

the alternative procedure, the Court said in effect (241) that, while it was true that, by the suit, appellant sought to enjoin and set aside the Commission's order, this was "only as a preliminary step toward obtaining, by a decision upon the merits of the claims, the same relief it failed to secure from the Commission"; that that was made clear by the prayer of the bill, asking the Court to direct the Commission "to grant the prayer of the complaint; find that petitioner had been overcharged to the extent set forth; and order a further hearing, if necessary, to determine the amount to be paid by way of reparation." "It is of no importance," the Court said, "that the adjudication sought is to take the form of a direction to the Commission to grant the prayer of the complaint filed before that body, etc., instead of a plenary judgment to the same end, for the prayer in that form is nothing less than an attempt to avoid the statute by indirection."

Appellant endeavors to distinguish the above decision and to minimize its authority on the ground substantially that, in contrast with the prayer of the Standard Oil Company's bill, the prayer of the bill it filed asked simply that the Commission's order be adjudged to be arbitrary, contrary to law and the evidence; that it be enjoined and set aside; and that the matter be remanded to the Commission for further action not inconsistent with the court's decree. But, while it is doubtless true that the prayer of the Stand-

ard Oil Company's bill was quite definite in the matter of the relief asked, and while it is plain that the decision utilized that fact in emphasizing that the prayer, in the form in which it was cast, was nothing less than an attempt to avoid the statute by indirection, it does not follow that, if the prayer had been less definite, the Court would not have still held it to be an attempt to avoid the statute by indirection.

Following the Court's decision in the *Standard Oil Co. case, supra,* there were other three-judge court cases instituted seeking the review of Commission orders denying reparation, the last of which to reach this Court being the *Ashland Coal Co. case, supra.* Similarly as appellant here, the plaintiffs in that case asked only that the Commission's order denying reparation be enjoined and set aside and the case remanded, alleging simply that the Commission's decision was arbitrary, beyond its statutory authority and without support of adequate findings. In briefs they urged: "There is no prayer before this Court that it determine either (a) whether we are entitled to reparation, or (b) the amount thereof. This Court is simply asked to determine whether the Commission acted arbitrarily or beyond its statutory power * * *." (61 F. Supp., p. 712.) The District Court, however, after discussing the election of remedy provision of section 9 and court decisions bearing thereon, including the de-

cision in the *Standard Oil case, supra,* said that it was not impressed by the attempt of the plaintiffs to distinguish those cases and to minimize their authority, and it concluded that it was without jurisdiction and that the complaint must be dismissed (p. 713).

The District Court's decision in the *Ashland Coal Co. case, supra,* was affirmed *per curiam* in 325 U. S. 840, this Court citing as authority "*Standard Oil Co.* v. *United States,* 283 U. S. 235, 240–241; *George Allison & Co.* v. *United States,* 296 U. S. 840." In citing the decision in the *Standard Oil Co. case,* it will be noted that pages 240–241 are particularly pointed to, thus making plain that the third and separate ground for that decision is referred to, namely, the ground based on the election of remedy provision of section 9.

In the *Allison & Co. case, supra,* the three-judge district court dismissed for lack of jurisdiction a suit seeking the setting aside of a Commission order which, while awarding some reparation, denied the full amount sought (12 F. Supp., p. 862, 864). And there, too, the plaintiffs insisted that they sought no reparation or damages, but merely asked annulment of part of a Commission order because arbitrary and unsupported by evidence. The court's action in dismissing the suit was based in part on the ground that the order was not reviewable because negative in character (p. 864) and in part on the said third and separate ground for the decision in the

Standard Oil Co. case, supra, namely, the ground based on the election of remedy provision of section 9. Dealing with the latter ground and speaking of the plaintiffs' contention that they sought no reparation or damages, the court said (863–864):

> * * * But it is too plain for argument that this suit was prompted by the hope that its success would pave the way for a later recovery of damages against the carrier in a larger amount than the order of November 7 permits * * *. If this court has no jurisdiction to entertain such complaint, it cannot be conferred by the devious method of assailing in one step the preliminary finding upon which the damages awarded must be computed and postponing to a later proceeding the actual prayer for additional reparation. Compare *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 235, 241 * * *.

Contrary to appellants' assertion (Br. 50) the *Allison* decision was not rested simply on the negative order doctrine, now discredited by *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. While, as above stated, the *Allison* decision was based in part on the negative order doctrine, it is made plain both by the District Court's discussion and holding above given, and its citation of the *Standard Oil Co. case, supra,* that the decision was in addition based on the election of remedy provision of section 9. The

first ground for the *Standard Oil* decision was also the negative order doctrine, but it will be noted that, in citing that decision, the court in the *Allison & Co. case*, did not point to that ground, but to page 241, that is, to the third and separate ground for the *Standard Oil decision*.

The District Court's decision in the *Allison & Co. case, supra*, was affirmed *per curiam* in 296 U. S. 546, this Court citing as authority "*Standard Oil Co.* v. *United States*, 283 U. S. 235, 241; *Brady* v. *United States*, 283 U. S. 804." The *Brady case*, presently to be discussed, is not a so-called negative order case; and, as just pointed out, the reference to page 241 of 283 U. S. indicates reliance, not on the first, but on the third and separate ground for the *Standard Oil* decision, namely, the ground based on the election of remedy provision of section 9.

Thus, although, similarly as in the case of appellant, the prayers of plaintiffs' bills in both the *Ashland Coal Co. case* and the *Allison & Co. case* sought no reparation, but merely asked that the orders denying reparation be set aside as arbitrary etc., and the matters remanded to the Commission, still the plaintiffs' suits were governed by the decision in the *Standard Oil Co. case, supra*. That is to say, the said plaintiffs, having elected to bring their claims for damages before the Commission by complaint, they were precluded from resorting to the alternative procedure of actions in the district courts and could not

"avoid the statute" by bringing three-judge court suits to enjoin and set aside the orders.

Appellant contends, apparently (Br. 48–49), that where the claims for damages require preliminary determinations of administrative questions the claimants must seek recovery by complaint before the Commission and have no real election to proceed in the district courts. The first answer to this, it would appear, is that the court decisions referred to and others would hardly have been predicated on the ground that there was such an election if none existed in fact. The second answer is that, although shippers, for the reason that such procedure is more convenient or for other reasons, generally proceed before the Commission for awards of damages, nevertheless they do, of course, have an election to bring actions in the district courts for such damages. Such actions may be brought after obtaining the necessary administrative findings from the Commission (*Geo. A. Hormel & Co.* v. *C. M. & St. P. Ry.*, 283 Fed. 915, 918, cited in the *Standard Oil Co. case, supra*), or they may be brought in court in the first instance, asking the court to stay its hand until such findings have been obtained. *Mitchell Coal Co.* v. *Penna. R. Co.*, 230 U. S. 247 and other decisions.

III

Appellants' suit was properly dismissed for the still further reason that the District Court's

jurisdiction to enjoin and set aside Commission orders did not extend to orders granting or denying claims for damages against the railroads. *Brady* v. *United States*, 43 F. 2d 847, affirmed *per curiam*, 283 U. S. 804. In the *Brady case*, similarly as in the *Allison & Co. case, supra*, the three-judge court was asked to enjoin and set aside a Commission order which, while granting some damages, failed to award the full amount sought by the shipper. The court, however, although holding that it was without jurisdiction did not rest its decision on the election of remedy provision but on broader grounds. That is to say, while it gave consideration to the fact that the Act contained provisions specifically dealing with reparation orders and suits thereon in court as distinguished from Commission orders of other kinds and the court procedure for the enforcement or enjoining thereof, the conclusion the court reached from this and the nature and history of the provisions was that its jurisdiction "to enjoin and set aside" was never intended to attach to Commission orders relating to reparation.

As above shown, this Court in affirming the *Allison & Co. case, supra*, cited the *Standard Oil Co. case, supra*; and its *per curiam* decision (283 U. S. 804) affirming the district court's decision in the *Brady case, supra*; and in affirming the later *Ashland Coal Co. case, supra*, the Court cited the *Standard Oil Co. case, supra*, and its

per curiam decision affirming the *Allison & Co. case, supra.*

Contrary to appellants' apparent contentions (Br. 37, 48, 51) this Court's decisions in the *Rochester Telephone Co. case; supra*, and *El Dorado Oil Works* v. *United States*, 328 U. S. 12, did not disturb the decisions in any of the above cases. In fact, the Court, in overturning in the *Rochester Telephone Co. case* the doctrine of non-reviewability of negative orders, makes special mention of the *Standard Oil Co. case*, saying that, though there it had held not reviewable a Commission order denying reparation "the main basis of the decision was not the 'negative order' doctrine but the statutory scheme dealing with reparations." (307 U. S., p. 140, note 23.) And there is nothing in the Court's decision in the *El Dorado Oil Works case, supra*, indicating that the Court considers that the statutory scheme dealing with reparations is no longer governing. The Commission's determinations, held to be reviewable in that case, related, not to claims for reparation against the railroads, but to administrative questions which, as shown in appellants' brief, arose in an action in assumpsit brought by the Oil Works against the American Tank Car Corporation to recover money claimed to be due under a car-leasing contract with that corporation. In its petition filed with the Commission, the Oil Works did not ask for an award of reparation

against the railroads but, consistent with the questions arising in the court action, simply asked for an order holding that Car Company could pay over to Oil Works the car mileage allowances collected from the railroads without violating the Elkins Act and that the payments would not constitute rebates or concessions. Indeed, it would appear that at the time the petition was filed any claim by the Oil Works against the railroads for reparation was barred by the statute.

On the Merits

I

Contrary to appellant's allegations the railroads' failure to supply wharves and perform handling service at Army Base Piers 1 and 2, or in lieu thereof to pay appellant allowances, was not an unreasonable or otherwise unlawful practice. Appellant stresses the fact (Br. 67) that at Norfolk the railroads have for many years treated the providing of pier facilities and handling service as included in the export and import rates, but it, at the same time, bases its contentions on its entitlement to the same treatment as is accorded private shippers (R. 92). At the public commercial piers at Norfolk, that is, at piers operated by public wharfingers, the railroads assume or absorb (and thus relieve shippers of) the charges of such operators for wharfage and handling service, the latter, however, only as to the carload freight above de-

scried (pp. 5–6). At private piers, that is, piers operated by shippers of the freight, the railroads do not at Norfolk, or other ports, pay the shippers allowances (out of the rates) for wharfage and doing their own handling.

Appellant questions (Br. 66) the Commission's finding (R. 94) that "Providing a wharf and handling the freight at (appellant's) piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property at his own convenience and expense before or after the transportation is performed"; it insists that, on the contrary, the providing of piers and handling service (unloading or loading) in respect of freight in export or coastwise movement is in all cases the legal duty of the railroads, as much so as "their legal duty to provide line-haul service"; and it contends, apparently (Br. 66–67), that this view is confirmed by the fact that the Commission, in distinguishing public piers from appellant's piers, found that "The wharfage and handling at defendants' public commercial piers are transportation provided by them for the shippers" (R. 93).

At the public commercial piers at Norfolk to which appellant refers, the railroads were by their tariffs (which offered to absorb the wharfage and handling charges of the pier operators, agents of the railroads) holding out as open to all shippers over their lines the piers and handling service as facilities and service for which no

charge would be made other than as included in the line-haul rates. This was true, too, of the Army Base Piers 1 and 2 at the time when those piers were operated by Transport Terminal Corporation. But, after the lease of the piers to that corporation was terminated and the Army took over their operation for the movement of military traffic, it was no longer possible for the railroads to hold out to all their shippers even that their freight would be moved over the Army Base piers at all. Of necessity and as shown by the evidence (see page 10, *supra*), the use of the piers permitted by the Army for commercial freight was very limited. Accordingly, after the Army took over the operation of Army Base Piers 1 and 2 the situation was not in the least like that obtaining when the piers were operated by Transportation Terminal Corporation and not in the least like that obtaining at the public commercial piers at Norfolk.

Moreover, there were other circumstances and conditions in connection with the Army's operation of the Base Piers which made the situation, not only unlike that at the public commercial piers, but unlike any situation where the railroads could be under any transportation obligation whatever, either of performance or payment of allowances. The operations had to be and were conducted under the rigid control and direction of the Army. There was no "room" for

operation at carrier convenience, but only to meet the convenience and urgent needs of the Army. In these circumstances, and as found by the Commission, transportation ended on the tracks (short of the piers) designated by the Army. Further, when the Army took over the piers, it notified the railroads that they would be managed and operated by the War Department and shortly thereafter asked the railroads to amend their tariffs so as to provide for an allowance (wharfage and handling) to the Government. Subsequently, as stated by the Commission, the appellant indicated a willingness to have the railroads do the work and to let them have its civilian force, but

> recognized that the civilian force was inadequate and that the defendants could not get the additional manpower to handle peak loads. Troops would have had to be used, and obviously, anything but operation by complainant was impractical.

It seems clear that the railroads' failure or refusal to undertake the work was well grounded in reason and that it was under no transportation obligation either to provide wharfage or handling service. As found by the Commission, the "providing a wharf and handling the freight at complainants' piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property * * *."

II

Contrary to appellant's allegations, the railroads' failure to provide wharfage and handling service or, in lieu thereof, to pay allowances did not result in unjustly discriminatory rates charged appellant. As pointed out by the Commission, as a result of the Army taking over the Army Base terminals and piers and their management and control, the traffic, when delivered on tracks in the terminals designated by the Army, passed from the custody of the railroads into the possession of its owner, the Government. In such circumstances the traffic was not export in the usual sense and except for the special tariff provision above referred to (p. 10) would not have been entitled to the export basis of rates.

Appellant could only have been subjected to unjust discrimination violative of section 2 if the railroads' said failure to pay allowances, etc., had resulted in their charging it a greater compensation than charged other shippers for like service in the transportation of a like kind of traffic under substantially similar circumstances. The evidence established that the railroads did not pay allowances to private shippers for wharfage or for handling export freight and that they did not perform the services on private piers. It also established that, in contrast to operations at public commercial piers, appellant took possession of its traffic at the Army Base terminals and

thereafter managed, directed and controlled the movement thereof, and the handling service. As found by the Commission:

> "the freight of other shippers (that is, at the public commercial piers) which receives the unloading service is not "like traffic" and, if handled in the same manner as the complainant's freight, the export rates would not be accorded it, much less the accessorial service. If anything, the complainant is being favored, but, of course, this is not unlawful under the circumstances.

III

Contrary to appellant's contentions the Commission's finding that such of the railroads' tariffs as remained for varying periods unchanged after the Army took over the Base piers did not include wharfage or handling was wholly sound. As appellant points out (Br. 72) the tariffs of the line-haul carriers that were not changed continued to provide substantially that, at Transport Terminal Corporation, wharfage and handling charges, as published in the Belt Line's tariff will be included in the transportation rates applicable to or from Norfolk, Va., on the following traffic moving in connection with the Virginian (or other) railroad through the above terminals. The Commission considered that, following termination of the lease to Transport Terminal Corporation and its consequent discontinu-

ance of operation of the Army Base piers, the tariff provision in question became meaningless. It said (R. 103):

> The reference in the tariffs in some instances was to the "terminals" and in other instances to the "facilities" of the Transport Trading and Terminal Corporation, but no mention was made in those tariffs to Army Base Piers 1 and 2 by that name. In order to sustain the complainant's contention, therefore, it would be necessary to read into the tariffs words which were not there.

It would seem that the Commission's construction was the only one that could be given the tariffs; and, in this connection, it will be recalled that, when the Army took over operation of the piers, what it asked of the railroads was that they amend their tariffs so as to provide for payment to petitioner of allowances, 1 cent per 100 pounds for wharfage and 3 cents for handling. And it will also be recalled that complainant, in praying the Commission for future relief, asked the Commission to establish (presumably in their tariffs) and pay to it allowances for wharfage and handling, all of which confirms the Commission's ruling. Another thing is that when Transport Terminal Corporation was operating the piers, the charges of that operator which the railroads assumed and paid were compensation paid their agent, the public pier operator. They were not allowances within section 15 (13) and cer-

tainly this works against any construction that would treat the provisions for payments to Transport Terminal Corporation as allowances which the tariffs required be paid the petitioner, shipper, or owner of the property transported.

IV

Contrary to appellant's contentions the railroads' failure to provide wharfage and perform handling at Army Base Piers 1 and 2 or, in lieu thereof, to pay the Government allowances did not result in unreasonable rates charged the Government. Due to severe competition for export traffic with Baltimore and other ports at shorter distances from the important origins, the export rates to Norfolk were depressed to a point well below the level of reasonable rates. The according of the allowances claimed to be the railroads' legal duty would, in effect, have depressed the rates to a still lower level. As already shown, the railroads' special tariff provision providing for the low export basis on traffic moving through Army and Navy bases was, in the circumstance of its handling, an in effect concession accorded the Government. Whatever further concessions the railroads might have accorded the traffic, certainly the Commission, acting on the ground of unreasonableness, is without authority to order action having the effect of further reducing rates already well below the level of reasonable maxima.

ARGUMENT.

Jurisdictional

I. The Urgent Deficiencies Act, which, in providing for court review of Commission orders, requires that the suits be brought against the United States, neither contemplates nor permits the bringing of such suits by the United States

As above shown, in its complaint before the Commission, appellant, the United States, alleged that, by reason of the railroads' failure to supply wharfage and perform handling at Army Base piers 1 and 2, or to pay it an allowance in lieu thereof, it had been subjected to an unreasonable practice, resulting in unreasonable and unjustly discriminatory rates; it asked that the railroads be required to establish and pay it in the future a reasonable allowance for furnishing the wharfage and performing the handling at said piers; and, for the past, it asked an award of damages (R. 144). Based upon the findings outlined in the preliminary statement, the Commission dismissed the complaint; and in the suit brought in the District Court, the United States asked that the Commission's order denying the award of damages be enjoined and set aside. By the complaint instituting the suit, the Commission as well as the United States was named a defendant.

Under section 9 of the Interstate Commerce Act, it was open to the United States to have brought its claim for damages either by complaint made to the Commission or by suit in a federal

district court, but it was without right to pursue both said remedies and had to elect which one of the two methods of procedure it would adopt. Speaking of this, the District Court, in its decision, said (78 F. Supp. 580, 582):

> In other words, the law accords two alternative remedies to any person who is damaged by any action of a common carrier violative of the Interstate Commerce Act. The injured party either may make a complaint to the Interstate Commerce Commission or many bring an action for damages against the carrier in the District Court of the United States. The two remedies are mutually exclusive. In this instance, the United States did not choose to bring suit against the railroads in the District Court of the United States, but elected to present a complaint to the Interstate Commerce Commission. The United States now seeks a review of the adverse decision of the Commission by an action brought before a three-judge court.

Continuing, the Court pointed out that the statute expressly provides, as to such court review, that the suits shall be brought against the United States; that, moreover, in such suits, the United States was not a mere nominal party defendant, for the legislative history showed that Congress deliberately and intentionally provided that the suits should be brought, not against the Commission, but against the United States; that, while

the Commission is given the right to intervene, there is no authority or warrant in law for making it a party defendant originally; that it was thus confronted with an anomaly—a suit by the United States against the United States (p. 582); that the principle that no person may sue himself was applicable to the United States; that such principle was but an application of the general doctrine that federal courts may deal only with actual cases of controversies; that it was of the view, therefore, that the suit could not be maintained, as the United States was both plaintiff and defendant (p. 183); that, as to the suggestion of the United States that, unless it might maintain the suit, it was without remedy, such contention was hardly well founded, since the statute gave it the alternative remedy of bringing the suit against the carriers in the federal district court; that, under any circumstances it (the Court) must enforce the will of Congress which clearly did not contemplate or intend to permit a suit by the United States against the United States to review an order of the Commission; and that "If the situation here presented is a *casus omissus*, the remedy lies solely with the legislative branch of the Government."

Appellant, the United States, in support of its contention that the District Court's decision is erroneous, relies in important measure upon *United States* v. *Public Utilities Commission* (Court of Appeals, Dist. of Columbia), 151 F. 2d

609, which sustained the right of the United States, as a customer of the Potomac Electric Power Company, to appeal to the District Court (D. C.) from an order of the appellee Commission fixing rates for sale of electric energy. The right to so appeal depended on whether the United States, as such customer, was "a person affected by" the order within the meaning of the statute and intent of Congress. It was held that it was, the court saying among other things (613–614), "The word 'affected' as used in the present statute seems to have been chosen by Congress, deliberately, to expand the privilege of complaint and appeal beyond that contemplated by words which it has used in other statutes, and beyond the conventional tests used in equity suits seeking restraint of governmental action * * *."

In contrast to the above, the very fact that the statute here makes the United States the defendant in suits to set aside orders of the Interstate Commerce Commission shows, it would seem, that Congress did not intend that it might as plaintiff institute such suits against Commission orders. The status of the United States as defendant in the suits is not that of a mere formal, or nominal, party defendant. The statute itself and this Court's decisions dispute any such view; and, as emphasized in the District Court's decision here on appeal, the legislative history shows that Congress, after full consideration thereof, including consideration of efforts

made by members of both houses to have the Commission substituted as such defendant, deliberately enacted the provision requiring that the suits be brought against the United States.

The provision that suits to enjoin, suspend or set aside Commission orders shall be brought against the United States was first introduced into the law by the Commerce Court Act of 1910. 36 Stat. 539, 542. Theretofore such suits had been brought against the Commission, and it was for the particular purpose of terminating that situation that the said provision was inserted in the bill to create the Commerce Court.[14] Objections to the provision were raised by members of both Houses who, being apprehensive that the Attorney General might not always vigorously defend Commission orders, favored the amending of the bill so as to provide that the suits be brought against the Commission and be defended by its own counsel. Attempts to amend the bill to so provide were made but were defeated,[15] the only success attending the attempts being the securing of compromise provisions, authorizing, as matter of right, the Commission and any party in interest to a Commission proceeding to intervene in any such suit and to "prosecute, defend,

[14] Senate Report 355, 61st Cong., 2d Sess., p. 6; House Report 923, 61st Cong., 2d Sess., pp. 3, 7, 159.

[15] 45 Cong. Rec. 5514–5523, 6346–6347, 6389–6409, 6441–6462.

or continue said suit * * * unaffected by any action or nonaction by the Attorney General.[10]

Accordingly, since in the face of strong opposition and attempted amendments which would have required that the suits be brought against the Commission, Congress deliberately enacted the provision requiring that the suits be brought against the United States, it seems evident that the statute does not permit of a procedure whereby the Commission would, in effect, be substituted for the United States as the defendant of the suit brought. And yet that is plainly the effect of the procedure here followed, whereby the United States, after naming the Commission as co-defendant in the bill, on its own behalf as defendant filed a neutral answer (R. 118–119), neither admitting nor denying the allegations of the bill, but leaving the defense of the suit for the Commission. Moreover, since Congress, dealing specifically with the Commission's status in the suits, deliberately and advisedly fixed such status as that, not of a defendant or co-defendant, but simply an intervener, it is further evident that even the first step in the United States said pro-

[10] The full text of the provision with respect to the Attorney General reads "and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the actio or non-action of the Attorney General." 28 U. S. C., sec. 45a. See *I. C. C.* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 23–25.

cedure—that of naming the Commission as well as the United States a defendant in the bill—was in conflict with the statute. True, the Commission made answer to the bill, but if, as shown by the statute and held by the District Court, there was no warrant in law for naming the Commission a co-defendant, such answer filed by the Commission can at best be regarded only as an intervention. But since, before the Commission could by intervention become a party defendant, a valid suit must have first been begun, it is difficult to grasp just how the Commission's intervention could be urged as supplying the necessary actual defendant to make the suit valid.

Apparently, the thought of appellant United States that it might bring the suit as plaintiff, if naming the Commission as co-defendant and thereafter in its own capacity as defendant filing a neutral answer, rests largely on the fact that the Commission, when intervening as defendant in a suit to set aside one of its orders, is authorized to continue the defense thereof unaffected by the action or non-action of the Attorney General." This is shown by its reference (Br. 22, 35) to a number of suits to set aside Commission orders in which it (the United States) also declined to defend, or to further defend, the orders, either by similarly taking a neutral position or other non-action, or by filing

ested could, by intervention, become parties defendants and, once defendants in suits validly brought and instituted, could continue the defense thereof "unaffected by the action or nonaction of the Attorney General." On the other hand, since here the suit against the United States to set aside the Commission's order was brought by the United States as plaintiff, its procedure of adding the Commission as co-defendant and thereafter in its capacity of defendant filing a neutral answer declining to oppose the bill had an entirely different effect. Not only was the effect to substitute the Commission for itself as defendant, but by the very fact it deemed there was need for such procedure the United States seemingly recognized the incongruity of any attempt to conduct the defense itself. Cf. *Globe & Rutgers Fire Ins. Co.* v. *Hines*, 273 Fed. 774, 777.

Appellant United States urges, however (Br. 27, 29), that it properly joined the Commission

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olina v. *United States*, 325 U. S. 507. (Suit by State Commission in which Price Administrator intervened as plaintiff. Following such intervention the United States filed amended answer taking a neutral position); *McLean Trucking Co.* v. *United States*, 321 U. S. 67. (Suit by motor carrier in which the Secretary of Agriculture intervened as a party plaintiff. United States filed answer, confessing error); *I. C. C.* v. *Mechling*, 330 U. S. 567. (Suits brought by water carriers and Secretary of Agriculture. United States filed answer confessing error. The District Court set aside the Commission's order and, on the appeal to this Court, the United States and the Secretary of Agriculture presented by brief and orally joint argument urging affirmance.)

as co-defendant; that the railroads intervened; that the actual controversy was between it as shipper plaintiff, contesting the order, and the railroads, both the railroads and the Commission being authorized to continue the defense of the order unaffected by its action or inaction in its capacity of defendant; and that this being the situation, "it would be absurd to apply the alleged rule that the United States may not sue itself." Continuing, appellant says (Br. 29):

> The matter is a practical one, which should be governed by realities and not by technicalities or legal fictions. And the practical fact here is that the United States is the plaintiff and in no real sense a defendant.

But appellant, in reaching out to the railroads to supply an actual controversy giving validity to the suit it brought as plaintiff, is pointing to a controversy which was not in the suit at the time when brought or, for that matter, until after the pleadings were joined (if that is the correct term here) by the filing of the United States' neutral answer declining to defend; for the railroads' intervention (R. 119–123) followed the filing of that answer (R. 118). It cannot be gainsaid that, in suits brought by plaintiffs contemplated by the statute, the only need for controversy is the controversy between such plaintiffs and the United States; for, in suits to set aside Commission orders, the only defendant the statute provides for is the United States. Cf.

answers or other action confessing error in the orders.[17]

But, since the suits referred to were brought by plaintiffs other than the United States it is evident that, even though, by its filed answers or other steps, the defendant United States declined to defend the orders, or to further defend them, the suits were, when and as brought, bona fide suits against the United States, presenting for decision actual controversies between such plaintiffs and the United States. All that being so, it followed that the Commission and others inter-

[17] *I. C. C. et al.* v. *Oregon-Washington R. R. & Navigation Co.*, 288 U. S. 14. (Suit by rail carriers. United States refused to appeal from adverse decision of District Court); *Mitchell* v. *United States*, 313 U. S. 80. (Suit by negro passenger. The United States defended the Commission's order in the District Court, but on the appeal filed a memorandum taking the position that the Commission and District Court had erroneously applied the law, p. 92); *I. C. C. et al.* v. *Columbus & G. R. Co.*, 319 U. S. 551. (Suit by rail carrier. The United States declined to appeal from adverse decision of District Court); *I. C. C.* v. *Railway Labor Assn.*, 315 U. S. 373. (This suit is not cited in appellant's brief. It was brought by the Railway Labor Executives Association. The United States declined to appeal from adverse decision of District Court); *I. C. C. et al.* v. *Inland Waterways Corp.*, 319 U. S. 515. (Suit by water carrier in which the Secretary of Agriculture intervened as a party plaintiff. The United States declined to participate, in effect taking a neutral position, p. 683); *I. C. C. et al.* v. *Jersey City*, 322 U. S. 503. (Suit by Jersey City in which Price Administrator intervened as a party plaintiff. The United States filed a neutral answer. The District Court set aside the Commission's order and on the appeal to this Court, the United States filed a memorandum urging affirmance, p. 504); *North Car-*

United States v. *Idaho*, 298 U. S. 105, 109. Therefore, if here in the Act's contemplation the United States was a plaintiff who could bring the suit against the United States to set aside the Commission order, it would have had no occasion to look to the railroads to supply a controversy or any need to add the Commission as co-defendant and by neutral answer to in effect eliminate itself from the case as defendant.

Following the statements in appellant's brief, above quoted, the brief says the ultimate question here is statutory, "and there is nothing in the statute, either explicitly or implicitly, which denies to the United States the right to obtain review of adverse orders of the" Commission. However, the statute does and did plainly and explicitly provide that the suits shall be brought against the United States, and therefore just as plainly did not permit the United States' procedure whereby, in order to gain standing to bring the suit as plaintiff, it in practical effect, substituted the Commission for itself as the defendant of the suit brought. Borrowing from appellant's statement that the question should be governed by realities, just that was the real practical effect of the procedure. As above shown, appellant says "the practical fact here is that the United States is the plaintiff and in no real sense a defendant." If appellant means by this that at some time after the inception of the suit it became established as a plaintiff which was

not also a real defendant, then at the time it brought the suit and for a period after the suit was one in which it was both plaintiff and defendant. If, on the other hand, it means, as appears to be the case,[18] that from the beginning its status as defendant was such that, in bringing the suit, it might add the Commission as co-defendant and itself file neutral answer, declining to defend, then, it is evident there never was instituted an actual suit against the United States as a real defendant—a defendant who it was ever intended should defend.

As above shown, both by its terms and as confirmed by its legislative history, the statute requires that suits to set aside Commission orders shall be brought against the United States. And further confirming the statute's requirement, decisions of this Court hold that suits to set aside Commission orders are essentially suits against the United States—that the United States is an indispensable defendant. *United States* v. *Griffin*, 303 U. S. 226, 238; *United States* v. *Idaho*, 298 U. S. 105, 109; *Illinois Central R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 503; *Lambert Co.* v. *Balto. & Ohio R. Co.*, 258 U. S. 377, 382. And, while such holding does not mean that the Commission, when intervening in a suit validly brought, could not continue the defense thereof unaffected by the United States' failure to de-

[18] See appellant's brief, p. 24, note 8.

fend, it does mean at the very least that, in order that a suit be valid at its inception or at any time, it must be a suit brought against the United States as a real, and not a mere, nominal defendant.

II. Appellant, Having Elected To Bring and Prosecute Its Claim for Damages by Complaint Before the Commission, It Was Precluded by Section 9 of the Act From Thereafter Resorting to the Alternative Procedure of a Suit in a Federal District Court, Whether Regularly or Specially Constituted

While appellant's complaint before the Commission was concerned with rates or practices for the future, its petition before this Court relates only to the Commission's denial of reparation or damages on past shipments moved over Army Base piers 1 and 2 up to the time the Army ceased its operation of the piers. In its complaint made to the Commission, appellant alleged as a basis for reparation, that, by reason of the railroads' failure to supply the wharfage and perform the handling service at those piers, or to pay it allowances in lieu thereof, it has been subjected to an unreasonable practice and the payment of rates that were unjustly discriminatory, unreasonable and inapplicable,[19] and it prayed that an order issue commanding the railroads to

[19] The issue of "inapplicability" was not raised by the complaint but was urged during the proceeding. On the other hand, the allegation that the rates that the Government paid were unreasonable or excessive seems not to have been much pressed (R. 559).

pay to it such amount as the Commission shall determine it is entitled to receive as an award of damages. Following full hearing, the Commission found, as above shown, that the railroads had not violated the Act in any respect and, therefore, that an award of damages was not due.

Section 8 of the Act provides substantially that any common carrier by railroad which shall do any act or thing prohibited or declared unlawful in the Act shall be liable in damages to the persons injured thereby. Section 9 of the Act provides that any person claiming to be so damaged may either make complaint to the Commission or may bring suit in a federal district court for the recovery of the damages for which the carrier may be liable under the Act, but further provides that "such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." Section 16 of the Act authorizes the Commission to award damages upon complaints filed with it. Covering cases where the awards are not complied with by the carriers, the section also provides for actions thereon in the Federal or State courts.

It is plain under the language of section 9, above quoted, that one who has sought, and failed to obtain, an award of damages from the Commission, cannot thereafter bring suit in a federal district court to recover damages arising out of

the same cause of action. This is indisputable so far as an ordinary suit in a district court is concerned. *Hormel & Co.* v. *Chicago, M. & St. P. Ry.*, 283 Fed. 915, 918 (C. C. A. 8);[20] *Bartlesville Zinc Co.* v. *Mellon*, 56 F. 2d 154, 156. And, since the provisions of Sections 9 and 16 of the Act are provisions specifically directed to the governing of the procedure for recovery of damages for violations of the Act, it is equally evident that their objectives may not be avoided through the procedure of a suit before a 3-judge district court, asking that a Commission order denying an award be set aside as unlawful, contrary to the evidence, etc., and that the case be remanded. *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708, 709, affirmed *per curiam*, 325 U. S. 840; *Atlantic Lumber Corp.* v. *Southern Pac. Co.*, 47 F. Supp. 511, 514.

The *Standard Oil case, supra*, was one before a 3-judge district court convened under the Urgent Deficiencies Act and involved a suit to set aside a Commission order denying an award of damages for alleged overcharges, the claimant contending that the rates exacted by the carriers were not the rates legally applicable under the tariffs. In affirming the District Court's decree dismissing the bill for lack of jurisdiction, this Court rested its decision on three grounds, the

[20] Cited in *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, 241.

first of which was that, since the Commission's denial order was negative, it was not subject to review by the courts, citing *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, and other decisions ruling that negative orders of the Commission were not reviewable.[21] Secondly, the Court held (pp. 238–240) that the case before the Commission had not, as contended, involved "merely the construction of the written words employed in a rate tariff—a simple question of law—but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use"; that that being so, the questions of rate applicability under the tariffs were for the Commission and, in the interest of uniformity, must be left to that body; and that (p. 240):

[21] Subsequent to the *Standard Oil case*, the Court rendered its decision in the *Rochester Telephone case*, 307 U. S. 125, whereby it overturned the doctrine that the courts were without jurisdiction to review negative orders. But, in the latter decision, the Court at the same time made clear that its decision in the *Standard Oil case* was primarily based on section 9 of the Act rather than the fact that the order involved was negative. Thus in a footnote the Court said (307 U. S., at p. 140):

"*Standard Oil Co.* v. *United States*, held not reviewable the action of the Commission refusing to grant reparation but the main basis of the decision was not the 'negative order' doctrine, but the statutory scheme dealing with reparations."

There being nothing to suggest that the Commission acted arbitrarily or without evidence to support its conclusions, or that it transcended its constitutional or statutory powers, *Interstate Commerce Comm. v. Union Pacific R. Co.*, 222 U. S. 541, 547, it follows that, apart from what is said in support of the ground first above stated, the order of the Commission was not susceptible of review by the courts; citing cases.

Directly following the above, the Court said (pp. 240–241):

Third. But putting the foregoing grounds entirely aside, and assuming the correctness of appellant's contentions to the contrary, nevertheless, having regard to the remedy invoked and the relief sought by the petition, we think the district court was without jurisdiction. Section 9 of the Interstate Commerce Act, c. 104, 24 Stat. 379, 382; U. S. C., Title 49, Sec. 9, provides that a claim for damages against a common carrier may be brought before the Commission by complaint, or by an action in a federal district court of competent jurisdiction, but that the claimant or claimants, "shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." Having elected to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from seeking repara-

tion upon the same claims by the alternative method of procedure. Compare *Geo. A. Hormel & Co.* v. *Chicago, M. & St. P. Ry. Co.*, 283 Fed. 915, 918.

It is true that appellant sought to enjoin and set aside the order of the Commission, but only as a preliminary step toward obtaining, by a decision upon the merits of the claims, the same relief it failed to secure from the Commission. This is made clear by the prayer of the petition, already quoted, namely, that the Commission be directed by the court to grant the prayer of the complaints; find that petitioner has been overcharged to the extent set forth; and order a further hearing, if necessary, to determine the amount to be paid by way of reparation. It is of no importance that the adjudication sought is to take the form of a direction to the Commission to grant the prayer of the complaints filed before that body, etc., instead of a plenary judgment to the same end, for the prayer in that form is nothing less than an attempt to avoid the statute by indirection. In substance and in principle the claim before the Commission and the claim before the court were the same, and the district court was without authority to entertain the controversy. It is hardly necessary to add that, since section 9 contemplates that the jurisdiction in such cases shall be exercised by the federal district courts as ordinarily constituted, the spe-

cially constituted court is without jurisdiction to dispose of an action under that section even if brought in the district court in the first instance.

The prayer of the petition in the above case, it will be noted, did not go so far as to ask the district court itself to award damages but, instead, asked it to direct the Commission "to grant the prayer of the complaints; find that petitioner has been overcharged to the extent set forth, and order a further hearing, if necessary, to determine the amount to be paid by way of reparation." However, the Court considered that the form in which the prayer was thus cast was, "nothing less than an attempt to avoid the statute by indirection."

The *Ashland Coal & Ice Co. case, supra* (1945, 61 F. Supp. 708), was also one instituted before a 3-judge court and involved a suit to set aside that part of a Commission order denying reparation for the past. The Commission had found that certain rates on coal were unreasonable and ordered a reduction for the future; "as to the past, however, the Commission decided that these rates were not unreasonable." (P. 709.) The plaintiffs in court, shippers, contended substantially that the Commission's decision as to the rates for the past was arbitrary, beyond its statutory authority and without support of adequate findings. Giving consideration first to the question of its jurisdiction to entertain the suit, the Court reviewed

the provisions of sections 8, 9 and 16 of the Act, cited decisions establishing that where a claimant had sought, and failed to obtain reparation, from the Commission, it could not subsequently sue on the same claim in an ordinary district court and then said (p. 710):

> This brings us to the jurisdictional problem of the case before us. Can a party who has sought reparation before the Commission and has been denied such reparation by the Commission, bring a civil action (under the Urgent Deficiencies Act) in a specially organized three-judge district court for the purpose of setting aside the Commission's order? Section 9 of the Interstate Commerce Act, 49 U. S. C. A. Section 9, we think, as interpreted by the federal courts, is an effective bar to such a civil action.
>
> Mr. Justice Sutherland seems to have dealt rather effectively with this problem in the closing words of his opinion in *Standard Oil Co.* v. *United States*, 283 U. S. 235, 240, 241, * * * *.

Following the above, the Court quoted that portion of the opinion in the *Standard Oil Co. case* which is set out above. Next it mentioned that, while, in the *Rochester Telephone Co. case*, 307 U. S. 125, the Supreme Court repudiated the doctrine of nonreviewability of negative orders, it was at the same time careful to distinguish its prior decision in the *Standard Oil Co. case* by saying that, though there it had held not reviewable

a Commission order denying reparation, "the main basis of (that) decision was not the 'negative order' doctrine but the statutory scheme dealing with reparations." Thereafter, the Court in the *Ashland case* quoted from other decisions, including *Brady v. Int. Comm. Com.*, 43 F. 2d 847 (affirmed *per curiam*, 283 U. S. 804), and, referring to the *Standard Oil, Rochester Telephone* and other cases quoted from, said (pp. 712–713):

> We are not impressed by the attempt of the plaintiffs to distinguish these cases and to minimize their authority. To us they seem controlling.
>
> Nor can we find any merit in the contention of plaintiffs that this is not a suit to set aside an order of the Commission denying reparation. In their brief we find:
>
> "There is no prayer before this Court that it determine either (a) whether we are entitled to reparation, or (b) the amount thereof. This Court is simply asked to determine whether the Commission acted arbitrarily or beyond its statutory power in deciding upon the *same mass of evidence* that rates were *not* unreasonable prior to a certain date, but that they are unreasonable subsequent to such date and whether the decision of the Commission contains the essential findings of preliminary fact to sustain these divergent views. As a necessary corollary this suit raises the further question whether the Commission has wrongfully assumed a power of discre-

tion in respect of determining past unreasonableness. If this Court finds with us, it is asked to remand the case for further action within the framework of power properly exercised."

If to this contention any answer be necessary beyond its mere statement, that answer, we think, is found in the words of Circuit Judge Swan, in *George Allison & Co. v. United States*, D. C., 12 F. Supp. 862, 863, 864:

"Plaintiffs, on the other hand, insist that they seek no reparation or damages, but merely ask annulment of part of an affirmative order arbitrarily fixing as reasonable the rates and charges attacked. The petition is framed so as to be consistent with this contention; as has been stated, plaintiffs request the annulment of the parts of the order of November 7, 1933, already indicated, and there is no prayer for damages or reparation. But it is too plain for argument that this suit was prompted by the hope that its success would pave the way for a later recovery of damages against the carrier in a larger amount than the order of November 7 permits. The plaintiffs, as complainants or interveners in the proceedings before the Commission, sought reparation as well as reasonable rates for the future. * * * Hence, in substance there is presented a situation wherein shippers sought reparation for excess charges exacted by a carrier, and now complain that the Commission fixed reasonable

rates for the past too high and failed to award them the full measure of damages they were entitled to. If this court has no jurisdiction to entertain such complaint, it cannot be conferred by the devious method of assailing in one step the preliminary finding upon which the damages awarded must be computed, and postponing to a later proceeding the actual prayer for additional reparation. Compare *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 235, 241, 51 S. Ct. 429, 75 L. Ed. 999. The real inquiry is whether such jurisdiction exists."

This case was affirmed, on the strength of the *Standard Oil case* and the *Brady case, George Allison & Co.* v. *United States*, 296 U. S. 346, 56 S. Ct. 174, 80 L. Ed. 387.

We must therefore conclude that the instant case is not within the jurisdiction of our specially organized three-judge District Court. For that reason, the complaint of the plaintiffs must be dismissed.

The feature of special interest in the above case—*The Ashland Coal & Ice Co. case*—is the argument of the plaintiffs attempting to distinguish it from the earlier decisions discussed, namely, their argument that they were not asking the Court to determine whether they were entitled to reparation, or the amount thereof, but simply whether the Commission had acted arbitrarily, beyond its statutory power or without adequate findings, and, if the Court found with them, to

remand the case to the Commission "for further action within the framework of power properly exercised." The first answer to this is that indicated by the three-judge court, that is, that the plaintiffs' argument supplied its own answer. For, while they were not asking the Court itself to award reparation either in a fixed or an undetermined amount, still the suit was one to set aside an order denying reparation and, if successful, would pave the way for the award which the Commission had denied. A further answer the Court said in substance was furnished by the decision in the *Allison case* (12 F. Supp. 862), from which it quoted. In that case, too, the plaintiffs similarly argued that they were not seeking, or praying for, reparation; rather, so they in effect urged, they were merely asking the court to annul, as arbitrary, that part of an affirmative order whereby the Commission found (for purposes of reparation) that the rates attacked were for the past "unreasonable only to the extent that they exceeded" certain maxima, while, for purposes of future reasonable rates, it, at the same time, fixed lower maxima (p. 863).[22] But here again the real reason for the suit was the recovery of

[22] The plaintiffs' petition charged that there was no evidence whatever to support the different finding as to the rates for the past. It prayed, in effect, that that part of the order denying the full reparation sought be annuled as arbitrary and without support in the evidence and that the proceeding be "remanded to the Commission, with directions to proceed in accordance with law" (12 F. Supp., p. 863).

reparation—the hope that it "would pave the way for a later recovery * * * in a larger amount than the order of November 7 permits. * * * If this Court has no jurisdiction to entertain such complaint, it cannot be conferred by the devious method of assailing in one step the preliminary finding upon which the damages awarded must be computed, and postponing to a later proceeding the actual prayer for additional reparation. Compare *Standard Oil Co. (Indiana) v. United States*, 283 U. S. 235, 241, * * *."

Similarly, as in the *Ashland* and *Allison* cases and others brought since the *Standard Oil Co. case, supra*, seeking the setting aside by a 3-judge district court of a Commission order denying reparation, the appellant here relies on the fact (Br. 50–51) that the prayer of the petition in the *Standard Oil case* asked the "same relief it failed to secure from the Commission," that is, it asked that the Commission be directed "to grant the prayer of the complaints filed with that body" (283 U. S., at 241). And, much as in such other cases, appellant insists that in the case at bar it sought "neither a money judgment nor an order directing the Commission to make an award," but sought "only to have the order denying relief set aside and a direction to reconsider the case in the light of the correct rule of law." However, while it is doubtless true that the prayer of the Standard Oil Company's bill was quite definite in the matter of the relief asked,

and while it is plain that the Court utilized that fact in emphasizing that Standard Oil was attempting to obtain through an order addressed to the Commission what it could not expect to obtain directly from the Court, it does not follow that, if the prayer had been less definite, the Court would not have still held it to be an attempt to avoid the statute by indirection.

As above shown, the petition in the *Ashland Coal Co. case, supra,* asked (61 F. Supp., at 712) substantially that the court determine whether the Commission had acted arbitrarily, beyond its statutory authority and without support of adequate findings and that, if it found with the petitioner, to remand the case to the Commission for further action within the framework of power properly exercised;

And the petition in the *Allison & Co. case, supra,* asked (12 F. Supp., at 863) substantially that that part of the Commission's order which denied the full reparation sought be annulled as arbitrary and without support in the evidence and that the proceedings be remanded to the Commission, with directions to proceed in accordance with law.

In the present suit the situation is practically the same, in that, while appellant's petition does not pray the Court to determine that it is entitled to reparation, or the amount thereof, it does ask (R. 71–72) the Court to adjudge that the Commission's order is arbitrary, capricious,

contrary to law and the evidence; "that a decree be entered perpetually enjoining, setting aside and annulling the said order; and that the matter be remanded to the Commission for further action not inconsistent with this Court's decree."

If there is any difference, it would seem that the prayer of appellant's petition is more definite than the others in the matter of the relief sought, since the remand to the Commission is "for further action not inconsistent with this Court's decree." This is particularly true if the relief asked of the Court is considered together with the complaint before the Commission.

The gist of appellant's complaint to the Commission was the railroads' failure, in respect of the traffic moving over Army Base piers 1 and 2, to pay it an allowance (out of the rates) of $1.00 for wharfage and $3.00 for handling (or themselves to furnish the wharfage and handling service); and such failure, it was alleged, constituted an unreasonable practice, resulting in rates that were unjustly discriminatory, unreasonable and inapplicable. And, too, the damage Division 2 considered appellant had incurred was the reasonable cost to it of furnishing such wharfage and performing such handling, which it found to have been 4 cents per 100 pounds, with interest, on traffic "in respect of which services were performed" (R. 86). Accordingly, when in its petition here, appellant prayed the Court to set aside the Commission's order denying

reparation and to remand the matter, the real relief it asked was inescapably a judgment, paving the way for the recovery of damages or reparation—quite as much so, certainly, as the relief asked in the *Ashland Coal Co. case* and the *Allison case*, just above discussed.

The decision in the *Ashland Coal Co. case* was affirmed by this Court in a *per curiam* decision, 325 U. S. 840, the Court citing as authority "*Standard Oil Co.* v. *United States*, 283 U. S. 235, 240–241; *George Allison & Co.* v. *United States*, 296 U. S. 546." True, the three-judge court in the *Ashland Coal Co. case*, not only held that it was without jurisdiction because of the election of remedy provision of section 9 of the Act, but also went on to sustain the order on the merits (61 F. Supp., at 713–715). True also, that the *Standard Oil* decision rests in part on the negative order doctrine. However, it will be noted that, in affirming the *Ashland Coal Co.* decision, the Court leaves no doubt as to the ground of affirmance; for, it not only cites as authority its prior decision in the *Standard Oil case*, but points to the particular pages to which it has reference, namely, pages 240–241, dealing with the third and separate ground for the decision, based on the election of remedy provision of section 9. And, too, it will be seen that the *per curiam* decision affirming the *Ashland Coal Co. case* also cites as authority the *Allison & Co. case*, above quoted from and discussed, which case the Court

had previously affirmed in 296 U. S. 546, citing as authority "*Standard Oil Co. v. United States*, 283 U. S. 235, 241; *Brady* v. *United States*, 283 U. S. 804."

See *Great Lakes Steel Corp* v. *United States*, 81 F. Supp. 450, 452.

Referring to the decision in the *Allison & Co. case*, appellant's brief (p. 51) says in effect that that decision rested upon the negative doctrine, thereafter set aside in the *Rochester case, supra*. It has already been pointed out that the Court's decision in the *Rochester Telephone Co. case* distinguished its prior decision in the *Standard Oil Co. case* on the ground that the "main basis of that decision was not the negative order doctrine but the statutory scheme dealing with reparations." And it will have been noted that the Court, in affirming the *Allison & Co.* decision, not only cites the *Standard Oil* decision, but the particular page (p. 241) dealing with the election of remedy provision of section 9 and where the Court stated that the form in which the prayer of the petition was cast, was "nothing less than an attempt to avoid the statute by indirection." That statement was particularly significant in connection with the *Allison & Co. case*, wherein the plaintiff urged that it was not seeking reparation but simply asking the Court to find the Commission's action arbitrary and remand the case for further action in accordance with the law. And that statement (in the *Standard Oil* decision,

page 241) was also, as above shown, equally significant in connection with the *Ashland Coal Co. case*, which clearly was the reason the 3-judge court quoted that portion of the *Allison & Co.* decision which it did quote and set out (see supra, p. 65).

True, the decision in the *Allison & Co. case* rested in part on the negative order doctrine; true, too, in contrast to the *Ashland Coal Co.* decision, both the District Court decision and this Court affirming decision in the *Allison & Co. case* were handed down prior to the overturning of the negative order doctrine. But, it will be recalled that the order in the *Allison case* was negative only in the sense that it did not grant the full relief sought. The District Court was of the view that it was, nevertheless, negative (12 F. Supp., at p. 864), but it is evident that this Court did not agree; that is to say, that its affirmance of the *Allison* decision did not rest at all on the negative order doctrine but squarely on the election of remedy provision of section 9. For, in affirming (296 U. S. 546) the said decision, the Court ignores the *Procter & Gamble case*, 225 U. S. 282, *Hooker* v. *Knapp*, 225 U. S. 302, and other negative order cases relied on by the District Court, and cites as authority only the *Brady case, supra*,[23] and the *Standard Oil case*, pointing to

[23] A case not based on the negative order doctrine and presently to be discussed.

page 241 of the latter, dealing with the election of remedy provision of section 9.

Appellant refers to the fact that the Court's *per curiam* affirming decisions were not accompanied by opinions or preceded by oral argument, but this, it is believed, gives to the decisions special force and significance. It means, it would seem, that the cases so appealed and disposed of by *per curiam* affirmances were already so well settled that all that was required were short opinions citing the Court's prior decisions governing the questions.

It should be mentioned that appellant also attempts to distinguish the *Standard Oil case* on the ground that the damages there sought were for alleged "overcharges" exacted by the carriers, raising a question of tariff interpretation usually determinable by the courts without prior reference to the Commission, whereas in the present case the damages sought were based on violations of administrative kind such as the charging, or engaging in, unreasonable or discriminatory rates or practices. In the first place, an examination of sections 8 and 9 will show that the Act does not lend itself to the attempted distinction. Section 8 makes the carriers liable in damages for any violations of the Act; and the election of remedy provision of section 9 plainly applies to complaints to the Commission and actions in the district courts for recovery of damages on account of any such violations.

Furthermore, the damages, or reparation, sought in both the *Ashland Coal Co. case* and the *Allison & Co. case* were based on alleged violations of administrative kind, that is, on rates alleged to have been unreasonable. Also, while in the *Standard Oil case*, as petitioner says, the damages sought were based on alleged overcharges, this Court held, as above shown, that the tariff question before it involved words of special or technical meaning and was generally so complex as to be an administrative question committed to the Commission.

While shippers seeking reparation generally apply therefor to the Commission, it will be realized that this method of procedure is usually the more practicable, particularly where they are at the same time asking for a reduction in rates or other future relief. This does not mean, however, that they are left without an election. Commonly, if desiring to bring court action for damages they first obtain from the Commission the administrative findings but without asking that body for damages or reparation. Cf. *Geo. A. Hormel & Co.* v. *Chicago, M. & St. P. Ry.*, 283 Fed. 915, 918; *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500, 508. On the other hand, they may in the first instance bring such a court action, at the same time asking the court to stay its hand until they have obtained from the Commission the necessary underlying administrative findings. *Morrisdale Coal Co.* v. *Penna. R. Co.*,

230 U. S. 304, 314–315; *Mitchell Coal Co.* v. *Penna. R. Co.*, 230 U. S. 247, 248. Compare *Southern Ry.* v. *Tift*, 206 U. S. 428, 434–435. See also *Bell Potato Co.* v. *Aberdeen Truck Line*, 43 M. C. C. 337, 343.

III. The District Court Was Without Jurisdiction for the Further Reason That the Jurisdiction To Enjoin and Set Aside Orders of the Commission Did Not Extend to Orders of the Commission Granting or Denying Claims for Damages Against the Railroads

As above shown, this Court in affirming the *Allison & Co. case* cited the *Standard Oil case* and its *per curiam* decision (283 U. S. 804) affirming *Brady* v. *United States*, 43 F. 2d 487; and, in affirming the *Ashland Coal Co. case*, the Court cited the *Standard Oil case* and its *per curiam* decision affirming the *Allison & Co. case*. Both the *Standard Oil case* and the *Brady case* were relied on by the 3-judge courts in both the *Allison* and *Ashland cases*. The decision in the latter case quoted at some length from the opinion in the *Brady case* which was written by Circuit Judge Parker.

In the *Brady case*, the 3-judge court was asked, in a suit by a shipper, to set aside in part a Commission order which, while awarding some reparation ($12,838.11), failed to award the amount ($57,735.11) to which the shipper believed it was entitled. The Commission, in arriving at the reduced amount, had applied a rule in mitiga-

tion of damages, and this action the shipper alleged in its bill was erroneous. Accordingly, the Commission order involved was like that in the *Allison & Co. case* in the respect that, while it was affirmative, awarding some damages, it failed to grant the full amount sought by the shipper. The court, however, while holding that it was without jurisdiction, did not rest its decision on section 9 but on broader grounds. That is to say, while it gave consideration to the fact that the Act contained provisions particularly dealing with reparation orders and suits thereon in court as distinguished from Commission orders of other kinds and the court procedure for the enforcement or enjoining thereof, the conclusion the Court reached from this and the nature and history of the provisions was that its jurisdiction "to enjoin and set aside" was never intended to attach to Commission orders relating to reparation. Among other things, the court said (pp. 850–851):

> * * * And when we take into consideration the history of the Interstate Commerce Act and its amendments and the nature of reparation orders, we are certain that it was not intended that they be included among those which the court was given the power in a suit in equity before three judges to enjoin or set aside.
>
> Reparation orders were provided for in the original Interstate Commerce Act and

were to be enforced by application to the Circuit Courts of the United States, 24 Stat. 379, 384. By the Act of March 2, 1889, provision was made that actions to enforce them should be tried at law before a jury, 25 Stat. 855, 859. Until the passage of the Hepburn Act of June 29, 1906, 34 Stat. 584, no order of the Commission was reviewable on application for injunction. The statutory jurisdiction to enjoin and set aside an order was granted by that act because then, for the first time, the rate-making power was conferred upon the Commission, and then disobedience of its orders was first made punishable. *U. S. v. Los Angeles & Salt Lake Railroad*, 273 U. S. 299, 309, 47 S. Ct. 413, 71 L. Ed. 651.

Amending section 15 of the Interstate Commerce Act, the Act of June 29, 1906, provided that the Commission should determine just, fair, and reasonable practices with respect to transportation and issue orders to carriers with respect thereto, and that all orders of the Commission, except orders for the payment of money, should take effect within such reasonable time, not less than thirty days, as might be prescribed by the Commission, unless same should be suspended or set aside by the Commission or by a court of competent jurisdiction, 34 Stat. 589, sec. 4 (49 U. S. C. A. sec. 15). By the amendment of section 16 (34 Stat. 590, sec. 5 (49 U. S. C. A. sec. 16)), it drew a clear distinction between reparation orders and

other orders of the Commission, by providing for suit in the circuit courts to collect damages in the case of reparation orders not complied with, and for application to a court of equity for the enforcement of other orders. Following this was the provision for suits to enjoin, set aside, annul, or suspend orders of the Commission; and when all of these provisions are considered together, we think it clear that the jurisdiction thus conferred was intended to relate to quasi legislative orders, in which the public at large are interested, disobedience of which is made punishable, and the suspension of which is expressly provided for by section 15 of the act, and not to reparation orders which affect only the rights of private individuals, have no binding force, and do not subject anyone to punishment for disobedience. For distinction between the two kinds of orders, see *Baer Bros.* [*Mercantile Co.*] v. *Denver & R. G. Co.*, 233 U. S. 479, 34 S. Ct. 641, 58 L. Ed. 1055.

This view is strengthened when it is remembered that the Act of June 18, 1910, creating the Commerce Court, 36 Stat. 539, vested that court with exclusive jurisdiction of suits to enjoin or set aside orders of the Commission and of only three other classes of cases, viz, suits for the enforcement of orders of the Commission, other than orders for the payment of money, suits to prevent unjust discrimination and rebating under the Act of February 19,

1903 (32 Stat. 847 (49 U. S. C. A. secs. 41–43)), and applications for writs of mandamus to require carriers to comply with the provisions of the act. It will be noted that all three of these classes embrace only cases which are prosecuted for the benefit of the public at large and to which the public, through the representation of the Attorney General or the Commission, is a party. And we think it is a reasonable inference from the fact that suits to enjoin or set aside orders of the Commission were included with these; that such suits were understood to include only those which were brought to enjoin or set aside orders made by the Commission in its quasi legislative capacity and which affected the public at large.

* * * * *

The power of this court to grant injunctions in cases of this kind is no greater than that of the Commerce Court; for we exercise jurisdiction in such cases only by virtue of the provisions of the Urgent Deficiencies Act of Oct. 22, 1913, 38 Stat. c. 32, which abolished the Commerce Court and transferred to the District Courts its jurisdiction.

The portion of the *Brady* decision above set out is the same as quoted in the *Ashland Coal Co.* decision except that two paragraphs are added at the beginning to fill out the Court's discussion of the Act's provisions as to reparation orders

and their enforcement prior to the Hepburn Act of 1906.

Near the close of the decision (p. 852), the court, in discussing the provisions of section 16 (2) authorizing suits in court to enforce awards of reparation not complied with by the carriers, said: "There is nothing in the Act, we think, which limits his (the shipper's) recovery to the amount awarded by the Commission," and there is no reason why the recovery should be so limited." Relying on this statement, apparently, Brady brought suit in a district court in an attempt to recover reparation in the amount he had sought from the Commission, that is, in an amount greater than the award allowed by the Commission. This attempt was unsuccessful, *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448, the Supreme Court holding (pp. 458–459):

> * * * Section 16 (2) does not permit suit in the absence of an award, and if the Commission denies him relief, a claimant is remediless. *Standard Oil Co.* v. *United States*, 283 U. S. 235. *Brady* v. *United States*, 283 U. S. 804. *Bartlesville Zinc Co.* v. *Mellon*, 56 F. (2d) 154. No suit is permitted if the carrier pays the award. *Louisville & N. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288. Cf. *Penna. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456. Plaintiff may not adopt the award as the basis of his suit and then attack it. Cf. *Mitchell*

Coal Co. v. *Penna. R. Co.*, 230 U. S. 247, 258.

The fact that the Act merely makes the findings and report of the Commission *prima facie* evidence and so preserves the defendant's right to contest the award gives no support to plaintiff's contention that it does not bind him. It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim. But the carriers made no such election. Undoubtedly it was to the end that they be not denied the right of trial by jury that Congress saved their right to be heard in court upon the merits of claims asserted against them. The right of election given to a claimant reasonably may have been deemed an adequate ground for making the Commission's award final as to him. Confessedly, it is final save when carriers refuse to pay within the time allowed. If by such a suit plaintiff may obtain a trial *de novo* or a revision of the award, the provisions of section 9 requiring election and prohibiting pursuit of both remedies would be set at naught in cases in which carriers refuse to pay and would be given effect in all other cases. There is no support for such a distinction. The construction for which plaintiff contends cannot be sustained. He is bound by the award.

The views of the 3-judge court in the first *Brady case* respecting a shipper's right to sue

for reparation in an amount greater than the award of the Commission were thus shown to be unsound. But it is apparent that this did not affect the soundness of its decision—its decision that its jurisdiction, as a specially constituted court, to review orders of the Commission on applications for injunctions did not extend to reparation awards or orders. This Court had but recently affirmed the decision, 283 U. S. 804, and, therefore, it is manifest that the district court's said views, later corrected, did not affect the soundness of the decision, this particularly since it was cited and relied on to support the Court's above holdings in 288 U. S. 448, and, as above shown, was relied on as authority in affirming the *Allison case* and also, it is evident, in affirming the *Ashland Coal Co. case*, in 1945. In fact, the *Brady* decision has been treated by all courts as sound and authority for what it holds.

Appellant further contends, apparently (Br. 37, 48, 51), that, whatever the force that might formerly have been given the above decisions, the decisions have in effect been repudiated by the *Rochester Telephone Co. case, supra*, and *El Dorado Oil Works* v. *United States*, 328 U. S. 12. So far as concerns the *Rochester Telephone case*, this contention seems answered by the fact, above referred to, that this Court, in overturning in that case the doctrine of nonreviewability of negative orders makes special mention of the *Standard Oil Co. case*, saying that; though there it had

held not reviewable a Commission order refusing reparation "the main basis of the decision was not the 'negative order' doctrine but the statutory scheme dealing with reparations" (307 U. S., p. 140, note 23). And there is nothing in the Court's decision in the *El Dorado Oil Works case, supra,* indicating that the Court considers that the statutory scheme dealing with reparations is no longer governing.

The Commission's determinations, held to be reviewable in the *El Dorado Oil case,* related, not to claims for reparation against the railroads, but to administrative questions which arose in an action in assumpsit brought by the Oil Works against the General American Tank Car Corporation to recover money claimed to be due under a car-leasing contract with that corporation.

Under that contract, the Oil Works leased, at specified rentals, tank cars from the Car Company and furnished them to the railroads for use in transporting its product. The Car Company collected the railroads' published tank car allowance and, as required by the contract, each month paid over the sums collected after deducting the rentals. Under the existing contract (also a prior contract) the allowances consistently exceeded the rentals in considerable amounts. So that the Oil Works was paying nothing for the cars but, instead, was making a substantial profit, which could, depending on whether the allowance was in excess of reasonable compensation

for the cars, operate as a rebate to Oil Works violative of the Elkins Act and section 6 (7) of the Interstate Commerce Act. Under the Elkins Act the Car Company (though a noncarrier) might be responsible as well as the railroads for the giving of the rebate. Because of a decision bearing on the question rendered by the Commission while the contract was in operation, the Car Company, while continuing to credit Oil Works with the rentals, discontinued payment to it of the balance collected from the railroads. The Oil Works brought against the Car Company its action in assumpsit to recover on the contract. The Car Company defended on the ground that to pay to Oil Works more than the rentals would make it a participant in the giving of a rebate violative of the Elkins Act. When the case reached this Court it was held that there were administrative questions as to practices and allowances involved requiring the Commission's determination; that it appeared that Oil Works was reaping a substantial profit from its use of the cars, that it was the policy of the Act that allowances and practices "which shall not offend against the prohibitions of the Elkins Act" shall be settled and fixed after full investigation by the Commission; and that, accordingly, the District Court should have stayed its hand pending the Commission's determinations in respect thereof.

In its petition to the Commission, Oil Works asked the Commission to hold hearings and for

an order holding that Car Company could pay the mileage earnings to Oil Works without violating the Elkins Act and that such payment would not constitute a rebate or concession. The Commission held a full investigation, joining the railroads concerned, and found that a just and reasonable allowance to Oil Works would be the cost incurred by it in furnishing the cars, namely, the monthly rental to the Car Company, that any amount in excess of that would be unjust and unreasonable in violation of section 15 (13) and would constitute a rebate and discrimination and involve a departure from the tariff rules applicable, prohibited by section 1 of the Elkins Act, and section 6 (7) of the Interstate Commerce Act. It further ordered that the proceeding before it be discontinued. (328 U. S., at 17–18.)

Oil Works brought suit in a three-judge district court to set aside the Commission's order, which court dismissed for lack of jurisdiction (59 F. Supp. 738) saying in part that

> By its finding and determination with respect to the practice here involved, the Interstate Commerce Commission made no decision which required any party to the proceeding before it to do or not to do any specific act. It followed the directions of the Supreme Court (*General American Tank Car Corp.* v. *El Dorado Terminal Co., supra* (308 U. S. 422), and determined, under the Interstate Commerce Act,

the lawfulness and reasonableness of the practice which had obtained between plaintiff and the tank car company. When this was done, its job was done. It was not required to make any order and made none and, having completed its work, stamped "finis" thereon and discontinued the proceeding. Hence there is no order, in the sense contemplated in the statute, requiring review by this court (*U. S.* v. *Griffin*, 303 U. S. 226, 233; *U. S.* v. *Ill. Cent. R. R. Co.*, 244 U. S. 82; *D. & H. Co.* v. *U. S.*, 266 U. S. 438; *U. S.* v. *L. A. Ry. Co.*, 273 U. S. 299).

In reversing the district court this Court said in part (328 U. S., at 18–19):

> * * * As the facts already stated reveal, the Commission's findings and determination if upheld constitute far more than an "abstract declaration." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 143. "Legal consequences" (*id.* at 132) would follow which would finally fix a "right or obligation" (*id.* at 131) on appellants' part. These findings are more than a mere "stage in an incomplete process of administrative adjudication," for the Commission here has discontinued further proceedings. *Id.* at 143. We, therefore, think that the Commission's action falls within the class of "orders" which *Rochester Telephone Corp.* v. *United States, supra*, held to be reviewable by a district court of three judges. * * *.

There is nothing in this Court's decision or that of the lower court to indicate that it was considered that a claim by Oil Works for reparation against the railroads was involved. The action in assumpsit brought by Oil Works against the Car Company was not an action by Oil Works for reparation or damages against the railroads. The administrative issue involved in the action in assumpsit was whether the allowances collected, or what amount thereof, could be paid to Oil Works without violating the Elkins Act. That issue remained the same in the circuit court of appeals and in this Court, this Court saying that it was the policy of the Act that allowances and practices which offend against the Elkins Act shall be settled and fixed by the Commission after full investigation. In compliance with this latter, the Commission conducted a full investigation joining the railroads.

In supporting the district court's decision that it was without jurisdiction, the principal contentions urged in the joint brief of the Government and the Commission and in oral argument were that the Commission's action in determining the administrative questions consisted simply of findings and conclusions; that the order discontinuing the proceeding was merely a procedural step indicating the closing of the docket; and that such action was merely an ancillary step in the action in assumpsit. This Court in its opinion made no mention of the election of

remedy provision of section 9; it made no mention of the *Standard Oil Co. case, supra*, of the *Allison & Co.* and *Ashland Coal Co. cases* or of the *Brady case*.

See *Great Lakes Steel Corp* v. *United States*, 81 F. Supp. 450, 453.

In the joint brief of the Government and Commission filed in 328 U. S. 12, the following footnote appears at page 21 thereof:

> Since, as held in the *El Dorado Terminal Co. case*, 308 U. S. at p. 431, it was the shipper (the Oil Works) and not the Car Company, which furnished the cars to the railroads, the shipper might (except for its agreement with the Car Company) have complained to the Commission and sought an award of damages (sec. 8 of the Interstate Commerce Act: see also *Paragon Ref. Co.* v. *Alton & S. R. R.*, 118 I. C. C. 166, 168). The time within which such a complaint may be filed is limited to two years (sec. 16 (3) (b)), and such provision of Section 16 "is not a mere statute of limitation but is jurisdictional." *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 642. Here the petition was not filed until 1940 although the cause of action accrued in 1934.

While the administrative questions in the *El Dorado case* involved past allowances and practices, clearly at no stage in the case or Commis-

sion proceeding was there involved a claim by Oil Works for reparation.

On the Merits.

I. The Railroads' Failure To Supply Wharves and Perform Handling Service at Army Base Piers 1 and 2, or in Lieu Thereof To Pay Appellant Allowances Was Not an Unreasonable Practice

As shown in the preliminary statement, appellant's complaint to the Commission alleged that the railroads' failure to supply wharves and perform handling service incident to delivery of its exports, etc., traffic at Army Base piers 1 and 2, or in lieu thereof, to pay it allowances for wharfage and handling, was an unreasonable practice, resulting in rates that were unjustly discriminatory, unreasonable and inapplicable.

At piers open to shippers generally at Norfolk, that is, at piers operated by public wharfingers, the railroads assume or absorb (and thus relieve shippers of) the charges of such operators for wharfage and handling service, these being 1 cent and 3 cents per 100 pounds respectively. But this they do under contracts employing the operators as their agents. So that, in principle the situation is the same as if the railroads themselves owned the piers and performed the handling, making no charge in addition to the rates therefor. At private piers, that is, piers operated by the owners of the freight, the railroads do not at Norfolk, or elsewhere, pay the shippers allow-

ances (out of the rates) for their piers and doing their own handling.

Prior to June 15, 1942, Army Base piers 1 and 2 were operated by Transport Terminal Corporation as a public wharfinger and as agent under contracts with the railroads. After the Army took over operation of the piers the situation as to traffic moving over the Army Base and piers underwent a complete change. Except for the very limited use permitted for commercial traffic, the traffic moving was military traffic, that is, it was appellant's own traffic; and, as testified, it was almost wholly for export. The railroads were advised that the terminal and piers were to be operated and controlled by the War Department and that all services would be performed by the War Department or its agency. And the testimony of the Army's own witness definitely showed that that was the way the terminal had to be and was, in fact, operated and all service performed, that is, under the close direction, management and control of the Army.

As a result of the Army taking over the terminals and piers and their management and control, the traffic, when delivered in yards, or on tracks, designated by the Army (R. 89-90) passed from the custody of the railroads into the possession of the Army, or Government, the owner of the traffic. In such circumstances the traffic was not export in the usual sense and, except for a special tariff provision would not have

been entitled to the export basis of rates (R. 91, 93, 103, 195, 288, 455). However, as explained in the preliminary statement (p. 11, *supra*), the railroads, at the request of the Army and Navy, had previously established in their tariffs a provision which accorded the export rates on shipments consigned to foreign countries and handled through Navy Yards, Navy Bases and Army Bases. But, as in effect said by the Commission, the granting of one concession did not necessarily require the granting of the further concession of paying to the Army the allowances demanded.[24] Differently stated, the according of the low export basis of rates on the traffic did not cure the basic infirmity that, under the conditions obtaining at the Army Base, the necessarily close coordination, management and control of all operations and services under one head—the Army—neither the handling service nor any other was common carrier work but was work of the shipper. Nor, under the conditions obtaining, could the wharves or piers be carrier facilities, but facilities for the Army or shippers' own uses. As stated by the Commission (R. 93–94):

> * * * The wharfage and handling at defendants', public commercial piers are transportation provided by them for the shippers. Providing a wharf and handling

[24] See footnote 11, p. 11, *supra*, showing that the railroads did not grant such allowances at any Naval or Army Base piers, where operated and controlled by the Government, etc.

> the freight at the complainant's piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property at his own convenience and expense before or after the transportation is performed. The defendants may not be required, therefore, to provide a wharf or handle the freight on the complainant's piers, and not being required to do so they are not compelled to pay an allowance in lieu thereof. *Propriety of Operating Practices—Terminal Services,* 209 I. C. C. 11.

In support of the above the Commission relies on the so-called *Plant Spotting cases,* repeatedly sustained by the Supreme Court. *Propriety of Operating Practices—Terminal Services,* 209 I. C. C. 11; *U. S.* v. *Am. Tin Plate Co. et al.,* 301 U. S. 402; *U. S.* v. *Wabash R. Co.,* 321 U. S. 403. It also relies on prior decisions distinguishing between the performance of handling service on publicly operated piers and the performing of such service on piers owned by the shipper. *Weyerhauser Timber Co.* v. *Penna. R. Co.,* 229 I. C. C. 463, 472; *McCormick Warehouse Co.* v. *Penna. R. Co.,* 191 I. C. C. 727.

Broadly stated, the question involved in the *Terminal Allowance* or *Plant Spotting* cases was whether the placement of cars on so-called interchange tracks at or near an industrial plant accomplished the delivery ending the transportation service or whether the industry was entitled

to have the cars carried beyond and spotted at desired unloading points within the plant enclosure. Similarly as to the service here, while the carriers are not forbidden to operate and perform service on industry property and track, at least not if they observe the Act's requirements, they are under no basic obligation to do so. The rates of the railroads are published to cities and towns without specifying the points where the delivery will be made, but by custom the rate includes delivery on the carriers' team tracks and on ordinary factory spurs or sidings. On the other hand, so far as the larger plants are concerned delivery is usually made on interchange tracks at or near the plants. What the plants contended was that, since the railroads commonly spotted the cars at warehouses or other convenient points on factory spurs this entitled them to have cars spotted at desired unloading points within their plants. But generally within the larger plants the tracks are in constant use for industry purposes and, moreover, it was shown that it was seldom possible for the carriers to spot the cars at their own convenience. Generally, they had to be first placed on the interchange or other tracks and thereafter spotted at the unloading points desired and at the convenience and under the directions and control of the industry. As stated by Justice Cardozo in *N. Y. C. & H. R. R. Co.* v. *General Electric Co.*, 114 N. E. 115, 117:

> Transportation includes delivery. Under the plantiff's published tariffs it does not include the work of loading and unloading. Official Classification, 38, Interstate Commerce Commission. But whatever is essential in order to complete delivery, the carrier must do. That is what it is paid for when it collects its regular rates. If it fails to make delivery, and the consignee through its own instrumentalities completes the work, an allowance is due. * * * But no allowance is due for service rendered by the consignee after delivery has been made and transportation is at an end. * * *.

And later the Court said:

> Indusfrial spurs within the switching limits designated by the carrier are to be regarded, indeed, for many purposes, as an extension of the terminal. * * * But reasonable delivery does not involve the carrier's cooperation in the division of labor and of functions between the sections of a gigantic plant. This network of tracks is and must be under unified control. Order and method must reign. * * * The engines that move within this plant are not doing work the plant ought to do or effectively could do. They are doing the defendant's work. They are plant facilities.

The above decision followed upon a decision of the Commission in *General Electric Co.* v. *N. Y.*

C. & H. R. R. Co., 14 I. C. C. 237, in which the Commission said at page 242:

> The real question before us is whether complainant, under the amended act to regulate commerce, may lawfully make any change and demand any compensation from the defendants upon the facts shown of record. Is the service performed by it a carrier's service? Is it a part of the transportation undertaken by the carrier? Or is it a shipper's service—something apart from the transportation, and which is done by the shipper for its own benefit?
>
> To that question we have given such thought and reflection as its importance demands, and our conclusion is that the handling of the cars by complainant within the inclosure of its plant has not been shown to be a carrier's service—something done by the complainant which the carrier ought to do as a part of its contract of transportation—but that the storage tracks and switch tracks and all the arrangements and facilities for moving cars within its plant inclosure are for the complainant's own convenience and are necessary to the economical conduct of its business.

U. S. v. *Wabash R. Co., supra,* sustained the Commission's decision in *Staley Mfg. Co. Terminal Allowance,* 245 I. C. C. 383, and in that case, too, the Commission emphasized that what the industry desired was not common carrier work but work coordinated to meet the needs of

the industry, that is, its own work. At p. 405, the Commission said:

> The Staley Company's contention that the principles prescribed in the original report, sensibly applied, entitle the industry to free spotting is not supported by the record. All the services incident to the placement of in-bound loaded cars and removal of out-bound loads are coordinated to meet the requirements of industrial processes. The Wabash crews assigned to the plant are familiar with the needs of the industry, and they perform the work with a minimum of instructions. In several respects the status of these crews is much the same as that of trusted employees of the Staley Company. The degree of coordination involved is further emphasized by the manner in which the various switching operations are performed. * * *

In the instant case the Commission, after describing the manner in which the operations and handling service had to be performed at the Base piers, said "All activities on the piers had to be supervised and coordinated by a governing head" (R. 90). And subsequently, as above shown, it found that "Providing a wharf and handling the freght at complainants' piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property" etc. This was a finding that the

providing a wharf and performing the handling were not common carrier but shipper facilities and work.

In *U. S. v. Wabash R. Co., supra* (opinion by Chief Justice Stone), the Court, speaking of the situation at the Staley plant said (p. 409):

> * * * the controlling question is whether the movement from the interchange tracks to points of loading and unloading is a plant service for the convenience of the industry, or a part of the carrier service comparable to the usual car delivery at a team track or siding. The Commission's finding that it is a plant service is supported by evidence and must be accepted as conclusive here.

In the *Terminal Allowance* or *Plant Spotting cases*, it was, as above stated, seldom possible for the railroads to perform the spotting at their convenience. The plants, including all facilities, had to be economically operated, and the saving effected through having the railroads do the work would have been insignificant compared with the disruption in economical operation if they were allowed to do it at their common carrier operating convenience. Consequently the railroads were usually paying allowances, or, if performing the spotting, were doing the work to fit the needs of the plant and under its direction and control. Speaking of this and its pronouncement in those cases, the Commission said in its final report (R. 105):

> We believe that our pronouncement may well be applied here. Although after June 15, 1942, the Transport Trading and Terminal Corporation had no facilities or terminals at the Army Base, it was the defendants' duty, under their line-haul rates, to place properly the complainant's cars for loading and unloading, and in the circumstances they discharged that obligation when they placed the cars in the complainant's storage yard adjacent to the piers.

Another thing that should not be overlooked is that, while shortly after taking over the operation of the Base piers, the Army asked the railroads to amend their tariffs so as to provide for allowances, it was not until many months later that it asked the railroads to perform the service; and even then the letter showed that the request for performance of the service was made because it was understood to be a prerequisite to an action before the Commission. In a situation where a shipper is performing work which he claims is carrier work, he can't ask to be paid, but must ask the carriers to perform the work. As frequently stated "a volunteer is entitled to no pay"; and, as expressed by the Commission, the Army could not require the railroads to hire it as their agent. While later the Army was doubtless willing to have the railroads undertake the work, the fact that the supply of civilian labor was inadequate and troops would have had to be used

plainly created a situation where "anything but operation by the complainant was impractical". (R. 90). The Commission's findings that anything but operation by the Army was impractical seems confirmed by the fact that, in its complaint to the Commission, the appellant's prayer for future relief (R. 150) does not ask the Commission to require the railroads to perform the handling or to supply wharves at the Army Base piers but, instead, to require them "to establish and pay in the future to complainant an allowance for wharfage and handling * * *."

"Whatever transportation services or facility the law requires the carriers to furnish they have the right to furnish." *Atchison, T. & S. F. Ry.* v. *United States,* 232 U. S. 199, 214. (R. 93.)

II. The Allegation of Unjust Discrimination

Because of the railroads' failure to furnish wharves at Base piers 1 and 2 and to perform handling, or in lieu thereof, to pay allowances for wharfage and handling, the appellant alleges that the rates it paid were unjustly discriminatory.

Answering this the Commission said (R. 92–93):

> The complainant asks that it be treated "exactly as commercial interests," and that it should "have the same rights and privileges that a private interest has." Section 2 of the act is to the effect that a carrier shall be deemed guilty of unjust discrimination if it receives from any person a

> greater or less compensation for any service rendered than it receives from any other person for doing him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. The defendants do not pay allowances to private shippers for wharfage or for handling export freight and do not perform the services on private piers. The freight of other shippers which receives the unloading service is not "like traffic," and if handled in the same manner as the complainant's freight the export rates would not be accorded it, much less the accessorial services. If anything, the complainant is being favored, but, of course, this is not unlawful under the circumstances. * * *

By the term "allowances" in the above, the Commission, of course, refers to the compensation which railroads pay for use of shipper facilities or for service performed by shippers. See sec. 15 (13). That the railroads do not, in connection with private piers, pay allowances for wharfage or handling service and do not perform the service on such piers is well established by the testimony and the Commission's findings (see pp. 6, 11, *supra*). As for "the freight of other shippers (i. e., at the public commercial piers) which receives the unloading service," the Commission finds that it "is not 'like traffic' and if handled in the same manner as the complainants'

freight the export rates would not be accorded it, much less the accessorial service. If anything, the complainant is being favored, but, of course, this is not unlawful under the circumstances."

In the preceding chapter, it was pointed out that, as a result of the Army taking over the Army Base terminals and piers, the traffic, when delivered at tracks or yards designated by the Army, passed from the custody of the railroads into the possession of its owner, the Army, or Government. In such circumstances the traffic was not export in the usual sense and, except for the special tariff provision providing for such basis of rates at Army and Navy bases, would not have been entitled to the export rates. (See p. 41, *supra*). While in according the special rates to the Government the railroads were doing nothing unlawful, nevertheless the freight of private shippers receiving the accessorial services, if handled in the same manner, would not have been accorded the export basis of rates, "much less the accessorial services." Stated in a different way, if the freight of private shippers receiving the accessorial services were handled in the same manner as was appellant's traffic, such shippers would not only have had to pay for the accessorial services, but would also have had to pay higher rates than accorded appellant.

In the circumstances, it is difficult to see how the treatment accorded appellant could have been found unjustly discriminatory. It was already

receiving a concession by being accorded, in compliance with request of the Army, the low export basis of rates. As stated by the Commission (R. 103), "the granting of one concession does not necessarily require another to the same party." And there was ample to support the Commission's finding that the traffic was not of like kind. As shown in the preceding chapter, the Commission had found as follows:

> The wharfage and handling at the defendants' public commercial piers are transportation provided by them for the shippers. Providing a wharf and handling of freight at the complainants' piers are not transportation but merely facilities provided and work done by a shipper for himself on his own property at his own convenience and expense before or after the transportation is performed.

The Commission also found that the railroads' obligation to properly place appellant's cars for loading and unloading was discharged "when they placed the cars in complainants' storage yards adjacent to the piers" (R. 105). In addition to the fact that at those points the freight passed from the custody of the railroads into the possession of its owner, there was the consideration that beyond those tracks and yards the operating circumstances and conditions were such that any service whether of carriage, handling or any kind, could not be regarded as common carrier transportation. Of necessity, all operation work and

service were under the strict and close management, direction and control of the Army. Therefore, if the railroads were to undertake operation or the rendering of service under these conditions, their common carrier status would have been subordinated to the convenience and needs of the shipper. The work would not have been common carrier transportation but the shippers' own work.

Supporting the Commission's conclusions as to this the Commission's findings show, among other things, that the Belt Line (performing the terminal switching for the owning railroads) delivered the cars at the "storage yard" and to some extent at the "north gate"; that it did this pursuant to prior instructions from the Army and on tracks designated by the Army; that, thereupon, the Army took possession of the shipments and controlled the movement beyond to the pier connections, operating several locomotives (with crews) of its own and one locomotive (with two crews) contributed by the Belt, but all at the direction of the Army's yardmasters; that the freight had to be handled according to priorities and various changing conditions confronting the Army, some cars having to be unloaded immediately whereas others were held a short time or the freight unloaded and stored on the piers or in warehouses; that frequently the Army had to load vessels day and night to meet a convoy deadline hour based on oversea calls; that all activi-

ties on the piers had to be supervised and coordinated by a governing head; that, as labor shortages developed, the Army assigned Italian service units to this work, and sometimes stevedores to supplement civilian labor; and that, at the time of the hearing, the civilian personnel was only about one-half of the total number employed (R. 89–90, 105).

While appellant attacks in various ways the Commission's conclusion that the railroads' failure under these conditions to supply warfage or perform handling at the Army Base piers was not unjustly discriminatory, their assertions, it is believed, are not in point.

In *U. S.* v. *Wabash R. Co., supra,* the question of unjust discrimination was raised by the Staley Company. In answer, the Court said (p. 411), "In determining whether there is a prohibited unjust discrimination or undue preference, it is for the Commission to say whether such differences in conditions exist and whether, in view of them, the discriminations or preference is unlawful. See *Barringer & Co.* v. *United States,* 319 U. S. 1, 7–8, and cases cited."

III. The allegation that the railroads' failure resulted in inapplicable rates or tariff departures

In its report on reargument the Commission said (R. 103):

> One of the questions here presented is whether the defendants, when they re-

fused, subsequent to June 15, 1942, to pay the complainant an allowance for wharfage and handling at Army Base Piers 1 and 2, or, in the alternative, to perform the handling service themselves, violated section 6 of the act, which provides in effect that the carriers shall not depart from the requirements of their published tariffs. The name of the Transport Trading and Terminal Corporation, as a terminal operator at Norfolk as to wharfage handling, and terminal services being included in the line-haul rates and allowances therefor, was not immediately canceled from the tariffs when the complainant assumed the operation of these two piers on June 15, 1942. The reference in the tariffs in some instances was to the "terminals" and in other instances to the "facilities" of the Transport Trading and Terminal Corporation, but no mention was made in those tariffs to Army Base Piers 1 and 2 by that name. In order to sustain the complainant's contention, therefore, it would be necessary to read into the tariffs words which were not there.

Appellant sets out (Br. 72) as representative the tariff of the Virginian Railway which provides substantially that "at * * * Transport Trading and Terminal Corporation * * * wharfage, handling and terminal charges (as published in the Belt Line's tariff) will be included in the transportation rates applicable to or from Norfolk, Va., on the following traffic moving in con-

nection with the Virginian Railway through the above terminals." Appellant contends that both the language and long construction given the tariffs shows that the Commission interpretation was erroneous.

It would seem that the Commission's construction was the only one that could be given the tariffs; and, in this connection, it will be recalled that, when the Army took over operation of the piers, what it asked of the railroads was that they amend their tariffs so as to provide for payment to petitioner of allowances, 1 cent per 100 pounds for wharfage and 3 cents for handling. Also it should be noted that the thing the Army found lacking was the failure of the tariffs to authorize allowances to the Government on freight handled over Army Base Piers No. 1 and 2 (R. 370).

It will also be recalled that complainant, in praying the Commission for future relief, asked the Commission to establish (presumably in their tariffs) and pay to it allowances for wharfage and handling, all of which confirms the Commission's ruling. Another thing is that when Transport Terminal Corporation was operating the piers, the charges of that operator which the railroads assumed and paid were compensation paid their agent, the public pier operator. They were not allowances within section 15 (13) and certainly this works against any construction that would treat the provisions for payments to Trans-

port Terminal Corporation as allowances which the tariffs required be paid the appellant, shipper, or owner of the property transported.

IV. The Allegation That the Rates Were Unreasonably High

Appellant's contention that the rates charged the Government were unreasonably high rests, as do other of its contentions, on the railroads' refusal to pay the allowances (out of the rates) asked of them, or in lieu thereof to perform the service. As emphasized by the Commission, if the rates were already below reasonable maxima rates, it would be without authority to order action having the effect of reducing them still further.

Furthermore, due to severe competition for export traffic with Baltimore and other ports at shorter distances from important origins, the export rates to Norfolk were depressed to a point below the level of reasonable rates. The according of the allowances claimed would, in effect, have reduced the rates to a still lower level. This seems to have been recognized by Government counsel at the hearing. At the oral argument the following colloquy between Commissioner Barnard and complainant's counsel occurred (R. 559):

> Commr. Barnard. But Mr. MacGuineas, I repeat that I think that you have the burden of showing that the maximum re-

maining would be a fair rate for the carriers, to the carrier, after you had exacted the 4 cents. You didn't do that as I understand the record?

Mr. MACGUINEAS. Well, as I understand the carrier's contention, they make the position that we have not proven that to receive the line-haul rate without rendering this terminal service, would be above the reasonable maximum. That is their position. Well, we say that is immaterial. The rate is somewhere within the limits of reasonableness, and the carriers, as I say, for 25 years, have assumed that obligation, they are failing to discharge it with respect to the Army, and with respect to the Army alone, and thereby are keeping for themselves 4 cents a hundred pounds.

In its report on reargument, the Commission, after full discussion of the matter said (R. 108):

* * * No evidence was adduced by the complainant to show that the export rates to Norfolk, in and of themselves, were and are unreasonably high. The complainant's contention is that these rates are shipside rates and they are unreasonable because no allowance has been made to it for the wharfage and handling. It is well settled that there is nothing inherent in export traffic which entitles it to rates lower than those applied to domestic traffic, and as nothing has been added to the export rates here in issue to cover the wharfage and handling they are not above a

> reasonable maximum level when a reasonable charge for wharfage and handling is added. This being true, an order directing the defendants to pay the complainant reparation in the amount of the aforementioned wharfage and handling charge would make the export rates just that much below the upper limit of reasonableness. * * *

In its first report on reconsideration the Commission said (R. 82):

> The line-haul rates in question are less than reasonable maxima and nothing has been added to them to cover the cost of wharfage and handling. * * *. None of the Norfolk rates exceed the domestic rates; practically all of them are lower. They are generally the same as the rates to and from Baltimore, although movement to and from Norfolk generally entails longer hauls. For example, from 106 important points in central territory the average distances are 838 miles to Norfolk and 690 miles to Baltimore. On class-rate traffic the export and import rates from and to Norfolk are more than 9 percent less than the corresponding prescribed domestic rates.

As above stated, the Commission, acting on the ground of unreasonableness, is without authority to order action having the effect of reducing rates already well below the level of reasonable maxima.

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

FEBRUARY 1949.

APPENDIX

The pertinent provisions of the Judicial Code as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208 (28 U. S. C. (1946 ed.) 41 (28), 43–47, 48; section numbers are to United States Code) are as follows:

§ 41. *Original jurisdiction.*—The district courts shall have original jurisdiction as follows:

(28) *Setting aside order of Interstate Commerce Commission.* — Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

§ 45a. (*Judicial Code, sections 212, 213.*) *Special attorneys; participation by Interstate Commerce Commission; intervention.*—The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43, and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special

attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practices of equity courts of the United States. (Mar. 3, 1911, ch. 231, §§ 212, 213, 36 Stat. 1150, 1151; Oct. 22, 1913, ch. 32, 38 Stat. 220.)

§ 46. (*Judicial Code, section 208.*) *Suits to enjoin orders of the Interstate Commerce Commission to be against United States.*—Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. (Mar. 3, 1911, ch. 231, § 208, 36 Stat. 1149; Oct. 22, 1913, ch. 32, 38 Stat. 219.)

§ 47. *Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking.*—No interlocutory injunction suspending or restraining the enforcement, operation or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same

shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall

be given precedence and shall be in every way expedited and be assigned for hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which the complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, ch. 32, 38 Stat. 220.)

§ 48. (*Judicial Code, section 211.*) *Suits to be against United States; intervention by United States.*—All cases and proceedings specified in section 44 of this title shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved. (Mar. 3, 1911, ch. 231, § 211, 36 Stat. 1150; Oct. 22, 1913, ch. 32, 38 Stat. 219.)

The pertinent provisions of the Interstate Commerce Act, as amended, are as follows:

Section 1, Paragraph (5) (a) of Part I of the Interstate Commerce Act:

(5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof

is prohibited and declared to be unlawful. (49 U. S. C. 1 (5) (a).)

Section 1, Paragraph 6 of Part I of the Interstate Commerce Act:

> (6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. (49 U. S. C. 1 (6).)

Section 2 of Part I of the Interstate Commerce Act:

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or per-

sons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U. S. C. 2.)

Section 8 of Part I of the Interstate Commerce Act:

That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fees, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. (49 U. S. C. 8.)

Section 9 of Part I of the Interstate Commerce Act:

That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provded for, or may bring suit in

his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. (49 U. S. C. 9.)

Section 15, Paragraph (13) of Part I of the Interstate Commerce Act:

(13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a

reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. (49 U. S. C. 15 (13).)

U. S. GOVERNMENT PRINTING OFFICE: 1948

railroads to pay wharfage and handling allowances to the United States, or in the alternative to establish separate wharfage and terminal charges with corresponding reductions in the line-haul rates, and (3) fix reparations for alleged unlawful charges made against the United States for past shipments.[2] The complaint did not ask for an order directing the railroads to perform the wharfage and handling services (R. 144-151).

A hearing was held at Norfolk, Virginia on July 18 and 19, 1944, before an examiner (R. 161-364). The report proposed by the examiner recommended dismissal of the complaint (R. 517-527). Exceptions were taken by the United States to the report and on April 5, 1945, the case was argued before Division 2 of the Commission (R. 527-559).

On August 3, 1945, Division 2 (with Commissioner Barnard dissenting) issued a report and order finding that the refusal of the railroads to make an allowance to the United States for wharfage and handling was an illegal and unreasonable practice and had resulted in unjust discrimination. *United States of America* v. *Aberdeen & Rockfish Railroad Company, et al.*, 263 I. C. C. 303 (R. 73-86). The defendant railroads filed a petition for reconsideration by the Commission and the effective date of the order issued by Division 2 was postponed until further order of the Commission (R. 87).

On April 3, 1946, the entire Commission heard oral argument on the case (R. 560-607) and on May 3, 1946, it issued a report and order dismissing the complaint (with Commissioners Aitchison, Splawn, Alldredge and Rogers dissenting). *United States of America* v. *Aberdeen & Rock-*

[1] An allowance is the payment of compensation to a shipper for performing a portion of the transportation obligation with respect to his own freight, in effect a refund of a part of the tariff charge.

[2] The only issue now left in the case is the issue of reparations. See pp. 11-12, *infra*.

fish Railroad Company, et al, 264 I. C. C. 483 (R. 87-101).

Thereafter, on petition of the United States, the case was reopened and reargued before the full Commission on November 6, 1946 (R. 607-648). On July 25, 1947, the Commission (with Commissioners Johnson, Rogers, Splawn, Aldredge, and Aitchison dissenting) issued a report which concluded that the complaint should be dismissed. *United States of America* v. *Aberdeen & Rockfish Railroad Company, et al*, 269 I. C. C. 141 (R. 101-114). On the same day the Commission entered an order dismissing the complaint (R. 72-73).

II. The Findings Made by the Commission.

The facts stated by the Interstate Commerce Commission in its findings may be summarized as follows:*

The railroads serving Atlantic ports do not follow the practice of assuming, in all circumstances, the obligation of unloading traffic from car to pier or from pier to car, and in no circumstances do they make an allowance to the shipper for the performance of these services. The practice of the railroads in respect to unloading depends on whether the piers are owned and operated by the railroads, by a public terminal operator, or by the owners of the freight (R. 102, 105). It is not the practice of the railroads to perform wharfage and loading services if the pier is owned and controlled by the owner of the freight, and in no event do they pay allowances in lieu of services (R. 92-94).

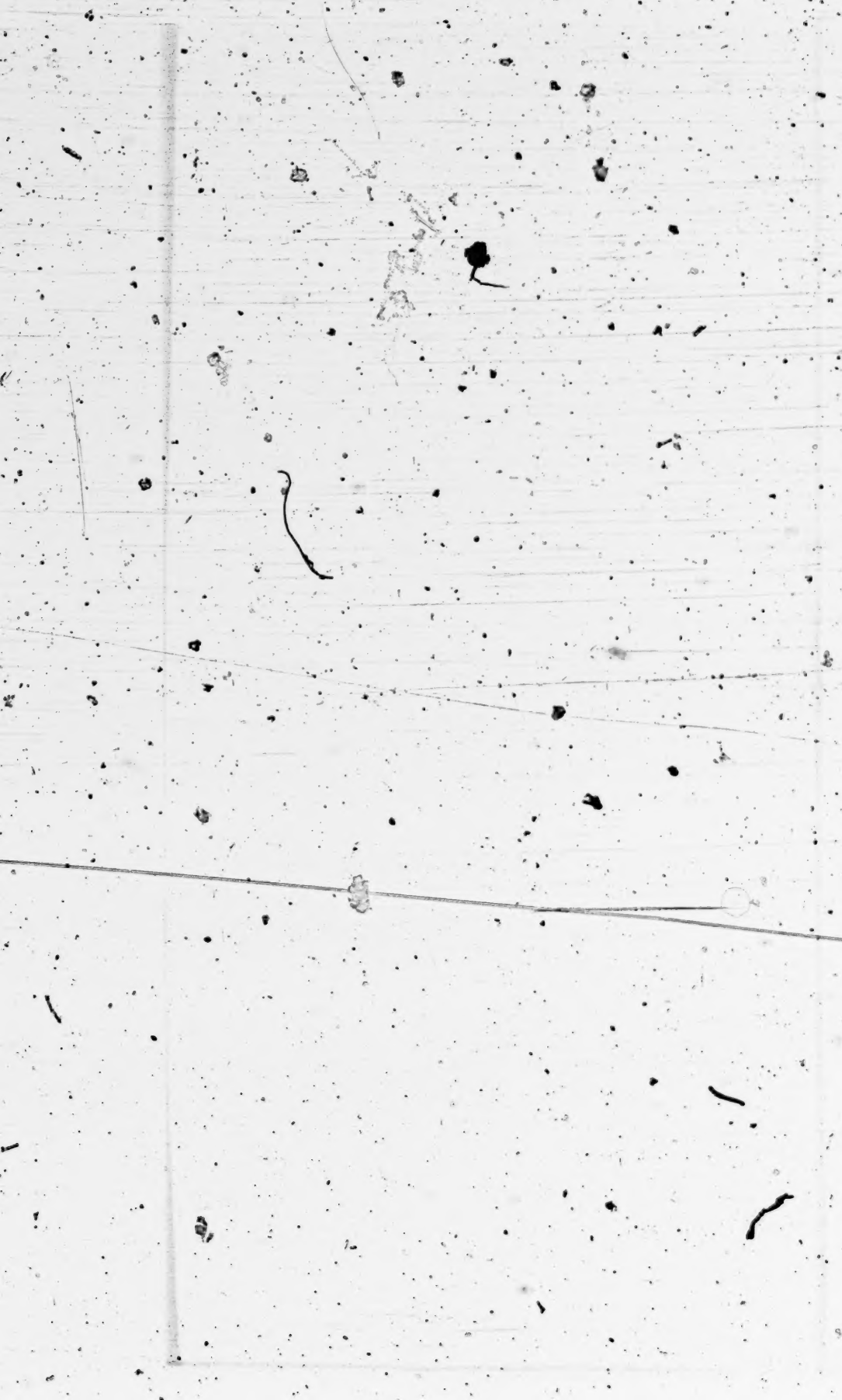
In Norfolk, Virginia, most of the railroad piers are operated by public terminal operator. Army Base piers 1 and 2 are one of the principal pier facilities in Norfolk. They were built by the United States during World War I and thereafter leased to private concerns for commercial operation as public terminal facilities (R. 88, 102).

*The evidence that supports the Commission's findings is discussed at pp. 65-95, *infra*.

Supreme Court of the United States

On Appeal From the United States District Court for the District of Columbia

BRIEF FOR THE INTERVENERS



INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	3
I. The Proceedings Before the Interstate Commerce Commission	3
II. The Findings Made by the Commission	5
III. Conclusions Adopted by the Commission	8
IV. Proceedings in the Court Below	12
Summary of Argument	13
Argument	21
I. The United States is not Authorized to Institute an Action to Enjoin and Set Aside an Order of the Interstate Commerce Commission	21
II. An Action by the United States Against the United States and the Interstate Commerce Commission to Enjoin and Set Aside an Order of the Commission does not Present a Justiciable Case or Controversy	46
III. The Appellant Having Elected to Seek Reparation from the Interstate Commerce Commission in the First Instance is Now Barred by Section 9 of the Interstate Commerce Act From Obtaining Judicial Review of the Commission's Order Denying the Relief Sought	54
IV. The Commission's Conclusions are Based Upon Adequate Findings, Supported by Substantial Evidence, and Are Not Contrary to Law; Therefore They May Not Be Set Aside by the Court	65
A. The Scope of Judicial Review	65

Page

B. The Legal Issues Involved in the Complaint to the Commission 67

C. The Commission's Conclusion That the Failure of the Railroads to Pay the Army an Allowance for Unloading and Wharfage Services Was Not an Unreasonable or Discriminatory Practice is Supported by Substantial Evidence, and is Not Vitiated by Error of Law 70

D. The Commission's Conclusion That the Freight Rates Assessed Against Government Traffic Were Not Unreasonable or Discriminatory is Supported by Substantial Evidence and is Not Vitiated by Error of Law 89

Conclusion 95

Appendix 96

CITATIONS.

Cases:

Aetna Life Insurance Co. v. Haworth, 300 U. S. 227 (1937) 47

Alabama v. United States, 325 U. S. 535 (1945) 54

George Allison & Co. v. United States, 12 F. Supp. 862 (S. D. N. Y. 1935), aff. *per curiam* 296 U. S. 546 55

American Trucking Assns. v. United States, 326 U. S. 77 (1945) 54

Armour & Co. v. Alton R. Co., 312 U. S. 195 (1941) 57, 61, 62

Ashland Coal & Ice Co. v. United States, 61 F. Supp. 708 (E. D. Va. 1945), aff. *per curiam* 325 U. S. 840 ..... 16, 55, 56, 57, 64

Atchison Railway Co. v. United States, 232 U. S. 199 (1914) 19, 69, 80

Atlantic Lumber Corporation v. Southern Pac. Co., 47 F. Supp. 511 (D. Ore. 1942) 55

Ayrshire Corp. v. United States, 331 U. S. 132 (1947) 40, 41, 52

Page

Barringer & Co. v. United States, 319 U. S. 1 (1943) 18, 72, 94
Brady v. Interstate Commerce Commission, 43 F. (2d) 847 (N. D. W. Va. 1930), aff. *per curiam* 283 U. S. 804 57
Butte, Anaconda & Pac. Ry. Co. v. United States, 290 U. S. 127 (1933) 64
Cargill, Inc. v. United States, 44 F. Supp. 368 (N. D. Ill. 1942) 27
Cleveland v. Chamberlain, 1 Black 419 47
Cleveland C. C. & St. L. Ry. v. United States, 275 U. S. 404 (1928) 87
Cohn v. Cities Service Co., 45 F. (2d) 687 (C. C. A. 2d 1930) 51
Crancer v. United States, 23 F. Supp. 690 (E. D. Mo. 1938), aff. 305 U. S. 567 55
Davis v. Donovan, 265 U. S. 257 (1924) 48
Defense Supplies Corp. v. American-Hawaiian S. S. Corp., 64 F. Supp. 459 (S. D. N. Y. 1945) 47
Defense Supplies Corp. v. United States, 148 F. (2d) 311 (C. C. A. 2d 1945), *cert. den.* 326 U. S. 746 47
El Dorado Oil Works v. United States, 328 U. S. 12 (1946) 16, 56, 62, 63, 65
Fed. Land Bank v. Bismarck Co., 314 U. S. 95 (1941) 50
Ford, Bacon & Davis v. Volentine, 64 F. (2d) 800 (C. C. A. 5th 1933) 52
Francis v. Southern Pacific Co., 333 U. S. 445 (1948) 65
Globe & Rutgers Fire Insurance Co. v. Hines, 273 Fed. 774 (C. C. A. 2d 1921), *cert. den.* 257 U. S. 643 47, 48
Graves v. N. Y. ex rel. O'Keefe, 306 U. S. 466 (1939) 50
Great Lakes Steel Corporation v. United States, 81 F. Supp. 450 (E. D. Mich. 1948) 64, 65
Gt. No. Ry. v. Merchants Elev. Co., 259 U. S. 285 (1922) 61
Great Northern Ry. v. Sullivan, 294 U. S. 458 (1935) 89
Hill v. Wilson, 210 Fed. 200 (C. C. A. 5th 1914) 52
Hillsdale Coal & Coke Co. v. Pennsylvania R. R. Co., 237 Fed. 272 (E. D. Pa. 1916) 58
Geo. A. Hormel & Co. v. C. M. St. P. & P. Ry. Co., 283 Fed. 915 (C. C. A. 8th 1922) 58
Illinois Central R. R. Co. v. Public Utilities Commission, 245 U. S. 493 (1918) 14, 23, 24, 25

Page

Indianapolis v. Chase National Bank, 314 U. S. 63 (1941) 47
Interstate Commerce Commission v. Columbus & Greenville Ry., 319 U. S. 551 (1943) 54
Interstate Commerce Commission v. Hoboken R. Co., 320 U. S. 368 (1943) 84
Interstate Commerce Commission v. Inland Waterways Corp., 319 U. S. 671 (1943) 40, 42, 52
Interstate Commerce Commission v. Jersey City, 322 U. S. 503 (1944) 21, 35, 53
Interstate Commerce Commission v. Mechling, 330 U. S. 567 (1947) 34, 40, 41, 42, 52
Interstate Commerce Commission v. Oregon-Washington R. Co., 288 U. S. 14 (1933) 28, 54
Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541 (1912) 65
Isbrandtsen-Moller Co. v. United States, 14 F. Supp. 407 (S. D. N. Y. 1936), aff. 300 U. S. 139 24
Jarka Corporation of Baltimore v. Pennsylvania R. Co., 130 F. (2d) 804 (C. C. A. 4th 1942) 84
Kendrick v. Kendrick, 16 F. (2d) 744 (C. C. A. 5th 1926), *cert. den.* 273 U. S. 758 51
Lambert Co. v. Balt. & Ohio R. R. Co., 258 U. S. 377 (1922) 21, 23
Lion Bonding Co. v. Karatz, 262 U. S. 77 (1923) 51
Lord v. Veazie, 8 How. 251 47
Medo Corp. v. Labor Board, 321 U. S. 678 (1944) 67
Meeker & Co. v. Lehigh Valley R. R., 236 U. S. 412 (1915) 66
McLean Trucking Co. v. United States, 321 U. S. 67 (1944) 54
Minds v. Pennsylvania R. Co., 237 Fed. 267 (E. D. Pa. 1916) 58
Missouri Pac. R. R. Co. v. Ault, 256 U. S. 554 (1921) 48
Mitchell Coal Co. v. Penna. R. Co., 230 U. S. 247 (1913) 58, 61
Myrick v. Michigan Central R. R. Co., 107 U. S. 102 (1882) 18
N. Y. Central R. Co. v. The Talisman, 288 U. S. 239 (1939) 18, 86
North Carolina v. United States, 325 U. S. 507 (1945) 18, 35, 54

Page

North Dakota v. Chicago & N. W. Ry. Co., 257 U. S. 485 (1922) 21, 23, 31
Penna. R. R. Co. v. Kittanning Co., 253 U. S. 319 (1920) 18
Penna. R. R. v. Puritan Coal Co., 237 U. S. 121 (1915) 58
Phoenix Insurance Co. v. Erie Transportation Co., 117 U. S. 312 (1886) 47
Pianta v. H. M. Reich Co., 77 F. (2d) 888 (C. C. A. 2d 1935) 51
Powers v. Cady, 9 F. (2d) 458 (W. D. La. 1925) 58
Procter & Gamble v. United States, 225 U. S. 282 (1912) 55
Pusey & Jones Co. v. Hanssen, 261 U. S. 491 (1923). 51
Railroad Board v. Duquesne Co., 326 U. S. 446 (1946) 18
Rochester Telephone Corp. v. United States, 307 U. S. 125 (1939) 16, 55, 56, 64, 66
South Spring Gold Co. v. Amador Gold Co., 145 U. S. 300 (1892) 47
Southern Railway Co. v. Tift, 206 U. S. 428 (1907). 61
Standard Oil Co. v. United States, 283 U. S. 235 (1931) 16, 55, 56, 57, 63, 64
Switchmen's Union v. Board, 320 U. S. 297 (1943) .. 64
Tank Car Corp. v. Terminal Co., 308 U. S. 422 (1940) 16, 61, 62
Terminal Warehouse v. Penn. R. Co., 297 U. S. 500 (1936) 55, 58
Texas v. Interstate Commerce Commission, 258 U. S. 158 (1922) 23, 26
Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426 (1907) 16, 57, 60
Texas and Pac. Railway v. Interstate Commerce Commission, 162 U. S. 197 (1896) 27, 28, 49
Texas Cement Co. v. McCord, 233 U. S. 157 (1914). 51
United States v. Am. Tin Plate Co., 301 U. S. 402 (1937) 20, 84
United States v. B. & O. R. Co., 293 U. S. 454 (1935). 66
United States v. Cooper Corp., 312 U. S. 600 (1941) 15, 44
United States v. Griffin, 303 U. S. 226 (1938) 14
United States v. Idaho, 298 U. S. 105 (1936) 14, 25, 26
United States v. Pan American Corp., 304 U. S. 156 (1938) 20, 84

Page

United States v. Public Utilities Commission, 151 F. (2d) 609 (App. D. C. 1945) 41
United States v. Rice, 327 U. S. 742 (1946) 22
United States v. Wabash R. Co., 321 U. S. 403 (1944) 20, 84, 93
Venner v. Mich. Central R. R. Co., 271 U. S. 127 (1926) 21
Wood-Paper Company v. Heft, 8 Wall. 333 47

Interstate Commerce Commission Reports:

Elimination of New York, N. H. & H. R. Pier Stations, 255 I. C. C. 305 (1943) 78
Galveston Commercial Assn. v. A., T. & S. F. Ry. Co., 25 I. C. C. 216 (1912) 86
Handling Freight Between Ships and Cars at Ports, 253 I. C. C. 371 (1942) 71
Interchange of Freight at Boston Piers, 253 I. C. C. 703 (1942) 88
M'Cormick Warehouse Co. v. Pennsylvania R. Co., 191 I. C. C. 727 (1933) 77, 78
City of Newark v. Pennsylvania R. Co., 182 I. C. C. 51 (1932) 19, 75, 77, 94
Newark, N. J., Cham. of Com. v. Pennsylvania R. Co., 206 I. C. C. 555 (1935) 18, 77, 94
Norfolk Port Commission v. Chesapeake & O. Ry. Co., 159 I. C. C. 169 (1929) 88, 94
City of Philadelphia v. Baltimore & O. R. Co., 231 I. C. C. 21 (1938) 92
Patterson v. Aberdeen & R. R. Co., 266 I. C. C. 45 (1946) 88
Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11 (1935) 81, 83
Stamps v. Chicago, R. I. & P. Ry. Co., 253 I. C. C. 557 (1942) 59, 64
United States v. Aberdeen & Rockfish Railroad Co., 263 I. C. C. 303 (1945); 264 I. C. C. 687 (1946); 269 I. C. C. 141 (1947) 3, 4, 5, 74
United States v. Pennsylvania R. Co., 32 I. C. C. 730 (1915) 85
Unloading Charges, Fruits and Vegetables, New York and Philadelphia, I. & S. Docket No. 5500 90

Page

Weyerhaeuser Timber Co. v. Pennsylvania R. Co., 229 I. C. C. 463 (1938) 18, 19, 75, 76, 94, 95
Wharfage Charges at Atlantic and Gulf Ports, 157 I. C. C. 663 (1929); 174 I. C. C. 263 (1931) 18, 87

CONSTITUTION AND STATUTES:

Constitution, Art. III, Sec. 2 46
Agricultural Adjustment Act of 1938, (7 U. S. C. 1291), Sec. 201 ..... 33, 41
Bituminous Coal Act of 1937, (15 U. S. C. 846), Sec. 16 ..... 34, 35
District of Columbia Code (1940), Sec. 43-705 41
Interstate Commerce Act, 49 U. S. C. 1 et seq. 2
Sec. 1 ..... 68, 73, 95
Sec. 1(5)(a) 3, 68
Sec. 1(6) 3, 68
Sec. 1(9) 87
Sec. 2 ..... 3, 19, 68, 73, 92, 93, 94, 95
Sec. 3 ..... 73, 77, 95
Sec. 3(2) 43
Sec. 6(7) 68
Sec. 6(8) 3, 10, 68, 69
Sec. 6(11) 87
Sec. 9 ..... 15, 16, 54, 55, 56, 57, 58, 62, 63, 64, 65
Sec. 15(13) 3, 68, 69, 71
Sec. 17(9) 22
Sec. 22 43

Judicial Code and Judiciary, 28 U. S. C. 21
Sec. 1253 2
Sec. 2101 2
Sec. 2322 23
Sec. 2323 ..... 32, 33
Sec. 2325 2

Mann-Elkins Act of June 18, 1910, c. 309, 36 Stat. 542 27
Sherman Act, 15 U. S. C. 1-7 44
Stabilization Act of 1942, 50 U. S. C. App. 961, Sec. 1 ..... 34, 35, 53

Page

Transportation Act of 1940, Sec. 321 of Title 3, 49 U. S. C. 65; Sec. 322 of Title 3, 49 U. S. C. 66 43
Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 28 U. S. C. 41(28) 43-48 ..... 2, 21
Sec. 43 25
Sec. 44 23
Sec. 45 23
Sec. 45a 23, 32, 33
Sec. 46 23
Sec. 47 23
Sec. 47a 23
Sec. 48 23

MISCELLANEOUS:

Annual Report to Congress by the United States Maritime Commission for the period ended June 30, 1947 11
Congressional Record, Volume 45 ..... 28, 35, 38, 39
House Report 923, 61st Congress, 2nd Session 27
House Report 1619, 80th Congress, 2nd Session, on H.R. 1468 36
Levi and Moore, *Federal Intervention: The Procedure, Statutes and Federal Jurisdictional Requirements*, 47 Yale L. J. 898 52
Moore, *Federal Practice* II, 2378 52
Senate Report 355, 61st Congress, 2nd Session 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 330.

UNITED STATES OF AMERICA, *Appellant*,

v.

INTERSTATE COMMERCE COMMISSION,

and

UNITED STATES OF AMERICA, *et al.*

On Appeal From the United States District Court for the District of Columbia.

BRIEF FOR THE INTERVENERS.

OPINION BELOW.

The opinion of the District Court (R. 129-134) is reported in 78 F. Supp. 580.

JURISDICTION.

The judgment of the District Court dismissing the complaint was entered on July 26, 1948 (R. 134-135). The appeal of the United States (plaintiff in the court below), was allowed on August 25, 1948 (R. 136). The jurisdiction of

this Court rests on Title 28 United States Code, Sections 1253, 2101, 2325, Act of June 25, 1948 (Public Law 773, 80th Congress). Probable jurisdiction was noted on November 8, 1948 (R. 652).

QUESTIONS PRESENTED.

1. Whether the United States is authorized to bring an action against the United States and the Interstate Commerce Commission to enjoin, annul, suspend and set aside an order of the Interstate Commerce Commission.

2. Whether an action brought by the United States against itself and the Interstate Commerce Commission to enjoin, annul, suspend and set aside an order of the Interstate Commerce Commission presents a justiciable case or controversy.

3. Whether a litigant who elects to seek reparation before the Interstate Commerce Commission is entitled to judicial review of an order of the Interstate Commerce Commission denying his prayer for reparation.

If each of these three questions is answered in the affirmative, a fourth question will arise:

4. Whether the conclusion of the Interstate Commerce Commission that the United States is not entitled to reparation by reason of the rates charged on traffic consigned to Army Base piers 1 and 2 at Norfolk, Virginia is based on adequate findings, supported by substantial evidence and otherwise lawful.

STATUTES INVOLVED.

The pertinent provisions of the Interstate Commerce Act (49 U. S. C. 1, et seq.), the Judicial Code and the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. 41(28), 43-48) are set out in the Appendix, *infra* pp. 96-106.

STATEMENT.

On November 20, 1947, the United States filed in the United States District Court for the District of Columbia a petition to enjoin, set aside and annul an order entered by the Interstate Commerce Commission on May 25, 1947 in a proceeding entitled *United States of America, Complainant v. Aberdeen & Rockfish Railroad Company, et al. Defendants*, Docket No. 29117 (R. 66-114). The petition named the United States and the Interstate Commerce Commission as defendants. The Pennsylvania Railroad Company, The Virginian Railway Company, Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, and Norfolk Southern Railway Company filed a motion for leave to intervene as defendants on February 2, 1948 (R. 119-122), and this motion was granted on March 1, 1948 (R. 122).

I. The Proceedings Before the Interstate Commerce Commission.

The proceeding before the Interstate Commerce Commission was commenced on April 15, 1944 by the filing of a complaint by the United States (R. 144-151). The complaint alleged that because certain railroads (including the interveners herein) had refused to make allowances to the United States for wharfage and handling, the rates charged the United States by these railroads on traffic consigned to Army Base piers 1 and 2 at Norfolk, Virginia were unjust and unreasonable in violation of Section 1(5)(a) and Section 1(6) of the Interstate Commerce Act, unjustly discriminatory in violation of Section 2 of the Act, unduly prejudicial to military traffic and not in full compliance with Section 6(8) of the Act, and in violation of Section 15(13) of the Act. The complaint alleged that the United States had been damaged "in a sum of money not presently ascertainable" and asked, by way of relief, that the Commission (1) enjoin the alleged illegal practices; (2) require the

For a number of years prior to 1942, the piers were operated by the Transport Trading and Terminal Corporation as a public wharfinger, and as agent of the railroads. The railroads compensated the terminal operator (their agent) for its services of unloading freight from car to pier, whenever the railroads undertook by tariff to perform that service, and for providing the pier; these payments are sometimes referred to as handling and wharfage charges. This arrangement imposed on the Transport Trading and Terminal Corporation other duties of a railroad agency such as collection of freight charges, protection against loss and damage claims, etc. (R. 88, 102).

The railroads' tariffs did not name Army Base piers 1 and 2, but referred to the tariff filed by the Norfolk and Portsmouth Belt Line R. R. Co. (referred to hereafter as the "Belt Line"), a terminal carrier which is owned by the line-haul carriers serving Norfolk and which performs terminal services for those carriers at Norfolk. The tariff filed by the Belt Line provided for absorption of the wharfage and handling charges on traffic destined for the facilities operated by the Transport Trading and Terminal Corporation. The Belt Line tariffs did not refer to Army Base piers 1 and 2 as such, but merely described the piers as facilities of the Transport Trading and Terminal Corporation (R. 88, 103-104).

Because of war conditions the United States, on June 15, 1942, terminated the lease under which the piers had previously been operated, and the War Department took over and operated the piers for the movement of military traffic. After that date, the Transport Trading and Terminal Corporation no longer had possession of the two piers and could not continue to perform the services that it had performed theretofore. Although after June 15, 1942 Transport Trading and Terminal Corporation no longer had any facilities at Norfolk, through oversight the interveners' tariffs were not changed immediately, but for

a period of time continued to refer to Transport Trading and Terminal Corporation (R. 88-89, 102, 103).

When the Army began operation of the piers, it supervised all activities on the piers and took possession and control of the piers and of the freight passing over the piers (R. 88-90; 92-93, 96, 104).

Soon after the Army took over the piers, the War Department made written request of the railroads to pay an allowance for wharfage and handling. The interveners declined these requests. On May 1, 1943, nearly a year after the Army had taken over the piers, the War Department requested that the intervener, The Pennsylvania Railroad Company, perform the services at the piers.[4] (R. 80). A similar request was made on May 22, 1943 on all Norfolk lines. The interveners refused to make allowances or to perform the services on the ground that the piers were being operated by the owner of the freight (R. 80, 90, 92).

Although the interveners declined to make an allowance for wharfage and handling or to perform the services on the piers, they made special arrangements so that as to traffic moving over Army Base piers 1 and 2 the United States would receive the benefit of export rates, which were lower than the domestic rates. The tariffs filed by the interveners prior to the war provided that export rates should apply only to traffic "which does not leave the possession of the inland carrier until delivered to the ocean carrier or its agent * * *." (R. 103). This provision would have prevented the application of the export rates on freight handled through Army Base piers 1 and 2 at Norfolk because that traffic left the possession of the inland carriers when delivered to the United States, the owner of the traffic. The interveners included a provision in the tariffs that the export rates should apply

[4] The letter of the War Department stated that the request was made as "a prerequisite" to the filing of a complaint before the Interstate Commerce Commission (R. 375).

also on shipments consigned to the United States Government and handled through Navy bases, Navy yards or Army bases for export to foreign countries. By reason of this provision the United States received the benefit of the lower export rates on traffic moving over the Army Base piers 1 and 2 at Norfolk (R. 91, 92, 93, 103, 106).

III. Conclusions Adopted by the Commission.

In its reports the Commission reviewed the relevant facts and discussed the principles of law that it believed were applicable. The Commission found that the railroads at Norfolk were under no obligation to provide pier facilities but that in any case they had not failed to provide reasonable facilities at Norfolk (R. 93, 94, 102, 105). In discussing the duty of the railroads to provide piers or pier services, the Commission said, in its last report (R. 102):

> "It is neither the legal duty of the railroads to provide piers, which are essentially steamship facilities, nor to load or unload carload freight except in unusual circumstances, such as livestock, or freight that is to be transhipped by the railroads or their agents. When they obligate themselves to load or unload carload freight, the duty is established by tariff undertaking. In assuming that obligation with respect to export and import traffic, the carriers have restricted the practice to so-called public piers, that is, piers operated by railroads, steamship companies, or public wharfingers, and have excluded the so-called private piers, that is, piers operated by the owners of the freight. See *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463."

The Commission concluded that the refusal of the railroads at Norfolk to make an allowance to the United States for unloading and wharfage had not resulted in the imposition of rates that were unreasonable or unjust. The Commission rejected the contention that under the tariffs the

railroads were bound to make these allowances (R. 92, 97, 103, 106-108). The Commission held that after June 15, 1942, the references in the tariffs to the Transport Trading and Terminal Corporation "were meaningless because the Transport Trading and Terminal Corporation no longer had any facilities at Norfolk" (R. 89). The Commission also held that to sustain the contention of the petitioner with respect to the meaning of the tariffs "it would be necessary to read into the tariffs words which were not there" (R. 103).

> "There is nothing in the tariffs, however, that requires the defendants to pay the complainant an allowance for wharfage and handling traffic through the Army Base at Norfolk." (R. 103).

The Commission also concluded that the refusal of the railroads to make the allowances sought by the United States did not result in unjust discrimination because the railroads did not make allowances or perform wharfage or unloading services for a private shipper on its own piers and that the United States was, therefore, being treated in exactly the same manner as other shippers who owned piers (R. 92-94, 105). In dealing with this point the Commission said (R. 105):

> "With respect to the allegation of unjust discrimination, the complainant asks to be treated the same as commercial or private interests. The defendants argue that when these two piers were taken over by the complainant on June 15, 1942, they became private piers to all intent and purpose. The defendants do not pay allowances to private shippers for wharfage or for handling export freight, and they do not perform that service on private piers. * * * The freight of other shippers at Norfolk which receives unloading service is not the like kind of traffic contemplated by section 2 of the act dealing with unjust discrimination, and if handled in the same manner as the complainant's freight the export rates would not apply, much less the

> accessorial service demanded by the complainant or an allowance therefor."

The Commission also rejected the Government's charges of unlawful discrimination against military traffic in violation of Section 6(8) of the Interstate Commerce Act. After pointing out that the Government received the benefit of the export rate by special tariffs, a rate to which the traffic would not be entitled but for the special tariff since the traffic passed into the custody of the owner at Norfolk, the Commission held that "if anything, the complainant is being favored" (R. 93) and added that "the granting of one concession does not necessarily require another to the same party. The allegation of a section 6 violation is not sustained." (R. 103).

The Commission rejected the argument that the railroads would be unjustly enriched if the wharfage and handling allowance were not paid to the United States for its traffic moving over the Army Base piers. The Commission concluded that nothing had been added to the line-haul export rates to cover the cost of wharfage and handling, and that the rates involved were below the reasonable maximum level (R. 92, 105-107). It pointed out that the record showed that the existence or non-existence of the port service does not affect the rate level (R. 92, 107). The Commission held, therefore, that the refusal to pay the allowances did not constitute unjust enrichment (R. 105-107).

The ultimate conclusion reached by the Commission in its Report on Reconsideration was stated in these words (R. 98):

> "On reconsideration, we reverse the prior findings and now find that the defendants' refusal to make the complainant an allowance or to perform the services afore-mentioned or to state in their tariffs the wharfage and handling charges at Norfolk separately from their rates is not shown to have been or to be an unjust or unreasonable practice, or to have resulted or

to result in unreasonable or inapplicable rates, or to have been or to be unjustly discriminatory to the complainant. The prior order entered in this proceeding will be vacated, and the complaint will be dismissed."

In the Report on Reargument, the Commission, in reaffirming the conclusions of its prior report, dealt specifically with the contention made by the United States that by reason of the refusal of the railroads to grant the allowances sought, the rates charged the United States had been unreasonable (R. 108):

> "No evidence was adduced by the complainant to show that the export rates to Norfolk, in and of themselves, were and are unreasonably high. The complainant's contention is that these rates are shipside rates and they are unreasonable because no allowance has been made to it for the wharfage and handling. It is well settled that there is nothing inherent in export traffic which entitles it to rates lower than those applied to domestic traffic, and as nothing has been added to the export rates here in issue to cover the wharfage and handling they are not above a reasonable maximum level when a reasonable charge for wharfage and handling is added. This being true, an order directing the defendants to pay the complainant reparation in the amount of the aforementioned wharfage and handling charge would make the export rates just that much below the upper limit of reasonableness. * * *
>
> "On reargument, we affirm our findings in the prior report on reconsideration. The complaint will be dismissed."

Prior to the date on which the Interstate Commerce Commission entered the order that the United States now attacks, (July 25, 1947) the Norfolk Army Base Terminal had been returned to the jurisdiction of the United States Maritime Commission, and the Maritime Commission had leased the property to public terminal operators.[5] In its

[5] See the *Annual Report to Congress by the United States Maritime Commission* for the period ending June 30, 1947, page 8.

Report on Reargument, the Commission referred to the fact that the piers were again to be operated by private interests and made the following statement (R. 108):

> "During the argument we were advised by counsel for the complainant that efforts are being made to have these two piers operated in a manner similar to that in effect prior to June 15, 1942. So that the purpose of this proceeding now is for reparation only."

IV. Proceedings in the Court Below.

In its petition filed in the court below, the United States alleged that the order of the Commission dismissing the prayer of the United States for reparation was not supported by proper findings, that the findings made by the Commission were not supported by substantial evidence and that its order was arbitrary and contrary to law (R. 71).

The United States as defendant in the action filed an answer alleging that the action was instituted at the request of the War Department, that the United States "as provided by law" was a defendant in the proceeding, that the Interstate Commerce Commission was authorized by law to appear and to defend its order without regard to the position which the United States might take in the action, and that in these circumstances the United States neither admitted nor denied any of the allegations of the petition. The answer for the United States as defendant was signed by the same Assistant Attorney General who signed the petition filed by the United States as plaintiff. (R. 118-119).

The Interstate Commerce Commission appeared and filed an answer raising two defenses: (1) That the court is without jurisdiction, under the Urgent Deficiencies Act, to entertain an action to review an order of the Commission denying reparation for past alleged violations of the Interstate Commerce Act; and (2) That the order of the Commission is lawful and is supported by the evidence (R. 115-117).

The answer filed by the interveners raised four defenses: (1) That the district court was without jurisdiction because there is no case or controversy in view of the fact that the United States is both plaintiff and indispensable party defendant, and that relief could be granted in this action only against the United States or its instrumentality, the Interstate Commerce Commission; (2) that the court had no jurisdiction because the United States had no statutory standing to institute the action; (3) that the court had no jurisdiction, under the Urgent Deficiencies Act, to review an order of the Interstate Commerce Commission denying reparation for alleged past violations of the Interstate Commerce Act; and (4) that the order of the Commission was lawful and supported by the evidence (R. 123-127).

A three-judge court, convened under the provisions of the Urgent Deficiencies Act (R. 128), heard the case on May 5, 1948 (R. 1-66). On June 28, 1948 the district court handed down its opinion holding that the United States was not authorized to bring a suit against itself and the Interstate Commerce Commission to enjoin, suspend, annul or set aside an order made by the Commission and dismissed the complaint. (R. 129-134). The order dismissing the complaint was filed on July 26, 1948 (R. 134-135).

SUMMARY OF ARGUMENT.

I.

The United States is not authorized to institute a suit to enjoin or set aside an order of the Interstate Commerce Commission. Under the Urgent Deficiencies Act, a suit to review an order of the Interstate Commerce Commission must be brought against the United States. No authority can be found in that statute for a suit by the United States attacking an order of the Interstate Commerce Commission, and this is the first time any such suit has been instituted. The fact that the statute requires

that the suit be brought against the United States and places on the Attorney General, acting on behalf of the United States, the responsibility for the defense of such a suit demonstrates that Congress did not intend to authorize a suit by the United States, as plaintiff, against itself.

The United States is the only indispensable defendant in a suit to enjoin or set aside an order of the Commission and is the only party that can be sued under the Urgent Deficiencies Act. The Interstate Commerce Commission has a discretionary right under the statute to intervene, but the Commission is not a necessary party and cannot be named as a defendant without its consent. *Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493; *United States* v. *Idaho*, 298 U. S. 105; *United States* v. *Griffin*, 303 U. S. 226. The appellant is urging a construction of the statute that would permit the United States to be both plaintiff and the only defendant and in which the Attorney General would represent both sides of the controversy.

This Court has held that the statutory requirement that the suit be brought against the United States is a matter of substance and not a mere matter of form as the appellant contends. Moreover, the appellant's position is inconsistent with the provisions of the statute placing the Attorney General in control of the interests of the Government in a suit to annul, suspend, or set aside an order of the Interstate Commerce Commission.

The legislative history of the statute shows that the Congress did not intend to authorize the United States to bring suits attacking the orders of the Interstate Commerce Commission. This conclusion is supported by the fact that where Congress has intended to authorize an agency of the Government to attack an order of the Commission, that authority has been explicitly conferred. The fact that the Attorney General has not chosen to defend the Commission's orders in some cases brought by private persons to review an order of the Commission has no relevancy to the

question whether the United States may institute a suit against itself to set aside an order of the Commission.

It would be contrary to the statutory plan of review of the Commission's orders to permit the United States to institute a suit attacking an order of the Commission. There is no merit in the argument that the statute should be construed as giving the United States the right to attack the Commission's orders in the courts because all private shippers have that right. This is the same kind of argument that was rejected by this Court in *United States* v. *Cooper Corp.*, 312 U. S. 600.

II.

The attempt by the United States to sue the United States and the Interstate Commerce Commission does not present a justiciable case or controversy. Since a suit attacking an order of the Commission must be brought against the United States, the same person, the United States, is both plaintiff and the indispensable defendant. A justiciable controversy is not created because the United States named the Interstate Commerce Commission as a defendant. The statute does not authorize suit against the Commission. In any event, there can be no diversity of legal interest between the United States as plaintiff and the Interstate Commerce Commission as defendant since the Commission is an instrumentality of the United States. Intervention by the railroads does not create a justiciable controversy since intervention presupposes a suit duly brought. The fact that the Attorney General has declined to defend the Commission's orders in certain cases is irrelevant since a justiciable case or controversy existed in those cases between the persons who instituted the suit and the United States.

III.

Under Section 9 of the Interstate Commerce Act a person must elect whether to seek reparation before the Inter-

state Commerce Commission or by a suit in a United States district court; the statute expressly provides that the litigant does not have a right to pursue both remedies. The appellant elected to institute an action before the Interstate Commerce Commission which denied its prayer for reparation; it follows that the order of the Commission is not reviewable. *Standard Oil Co.* v. *United States*, 283 U. S. 235; *Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708, (E. D. Va. 1945) aff. *per curiam*, 325 U. S. 840. The decisions of this Court that bar review of an order of the Commission denying reparation do not rest on the so-called "negative order" doctrine but on the statutory scheme enacted by the Congress for dealing with reparation. See *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 140, footnote 23.

This interpretation of the election of remedies provision of Section 9 is not inconsistent with the primary jurisdiction rule. That rule requires only that there be preliminary resort to the Commission for decision of questions committed by the Congress to the administrative judgment of the Commission. The primary jurisdiction rule does not require that a claim for damages be submitted in the first instance to the Commission but only that a determination by the Commission on administrative questions be secured before a suit is instituted in the district court or while such a suit is pending. *Tank Car Corp.* v. *Terminal Co.*; 308 U. S. 422; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. In this case appellant could have submitted the administrative questions to the Commission for decision, and then, if the Commission's decision were favorable, brought an action in a United States district court for reparation.

The decision of this Court in *El Dorado Oil Works* v. *United States*, 328 U. S. 12, does not support appellant's position. No issue arose in that case as to the right of the United States to sue itself or as to the meaning of the election of remedies provision of Section 9. The decision in

that case relates only to the right of review in the event the litigant does not seek damages before the Interstate Commerce Commission, but submits only an administrative question with a view to obtaining a determination that can be used in litigation in a district court.

IV.

The order of the Commission is supported by substantial evidence and is otherwise lawful.

Before the Interstate Commerce Commission, appellant argued (1) that when the Army took over Base piers 1 and 2 for its own purposes it was thereafter entitled to be paid the same wharfage or rental costs (one cent per hundred pounds of freight) that were incurred by the railroads when the facility was used by the railroads as a railroad terminal and (2) that the railroads were required to appoint the Army their agent and to pay to the Army the same unloading costs (three cents per hundred pounds of freight) previously incurred by the railroads when the agent of their own selection unloaded freight in railroad custody. In short, the appellant contended that the railroads had an absolute legal duty to provide the Army with piers for its exclusive use and to employ the Army to unload traffic which belonged to the United States and was in the possession of the Army (although the railroads owe these alleged obligations to no other shipper).

Appellant also argued that the railroads were bound to pay four cents per hundred pounds to the Army, notwithstanding the fact that the line-haul rates to Norfolk were fixed without including or specifically taking into account the cost of wharfage and handling; notwithstanding the fact that there was no evidence whatsoever before the Commission to support appellant's assertion that the line-haul rates to Norfolk paid by the Army were unreasonable; and notwithstanding the fact that the rates charged the Army were not higher but were less than the rates charged other shippers similarly situated.

The Commission properly rejected these arguments.

The Interstate Commerce Commission correctly held that it was not the legal duty of the railroads to provide piers, which are essentially steamship facilities, or to unload carload export freight, unless the railroads assume these obligations by their tariffs. *Barringer & Co.* v. *United States*, 319 U. S. 1, 3; *Penna. R. R. Co.* v. *Kittanning Co.*, 253 U. S. 319, 323; *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463 (1938); *Wharfage Charges at Atlantic and Gulf Ports*, 157 I. C. C. 663 (1929); 174 I. C. C. 263 (1931). The question whether piers and unloading are "transportation" facilities and service is not determinative. This Court has recognized that a "transportation service" may be a service that a railroad is not obligated to perform. See *Railroad Board* v. *Duquesne Co.*, 326 U. S. 446, 453. The decisions in *Myrick* v. *Michigan Central R. R. Co.*, 107 U. S. 102, and *N. Y. Central R. Co.* v. *The Talisman*, 288 U. S. 239, do not establish that the railroads were under a legal duty to provide piers or to load or unload carload export freight.

The Commission's conclusion that after the Army seized the piers the tariffs of the railroads imposed no obligation upon the railroads to make payments to the Army for wharfage or unloading is correct as a matter of law, and is supported by substantial evidence. The applicable tariff referred to the agency relationship existing between the railroads and the Transport Trading and Terminal Corporation—a relationship that was terminated when the Army seized the piers. The tariffs did not obligate the railroads to pay the Army a charge for wharves that the Army had seized nor did they obligate the carriers to appoint the Army their agent for the purpose of unloading freight in the custody of the Army. That the tariffs did not obligate the railroads to make payments to the Army for wharfage and unloading was admitted by the Army itself, which in the opening stages of the controversy asked the carriers to change the tariffs so as to provide for these payments to the Army.

The Commission correctly concluded that it was not the practice of the railroads in dealing with export traffic to obligate themselves to load or unload carload freight except at public piers, and that the railroads under no circumstances assumed that obligation at piers controlled by a shipper. Cf. *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463 (1938); *City of Newark* v. *Pennsylvania R. Co.*, 182 I. C. C. 51 (1932); *Newark, N. J. Chamber of Com.* v. *Pennsylvania R. Co.*, 206 I. C. C. 555 (1935).

There was substantial evidence in the record before the Commission to support its conclusion that when the Army seized the piers and took over their operation, the piers ceased to be public piers and became private piers. The evidence showed that after the seizure the Army changed the method of operation of the piers, took custody of the freight passing over the piers and otherwise acted in all respects as the owner of a private pier would act.

The Commission correctly concluded, both on the facts and the law, that the railroads did not discriminate against the Army in violation of Section 2 of the Interstate Commerce Act by refusing to pay four cents per hundred pounds for wharfage and unloading; in this respect, the Army was treated exactly in the same way as all other owners of private piers. The only respect in which the Army was treated differently from the owners of private piers was that the Army was given an advantage over those owners by being accorded the benefit of the lower export rates which would not have applied in the case of any other owner of a pier who took possession of his own freight as the Army did.

The Commission correctly held that even if the railroads had a legal obligation either to provide piers or to unload export carload freight, the obligation was to provide facilities and service and not to pay allowances. *Atchison Railway Co.* v. *United States*, 232 U. S. 199. The facts before the Commission support its conclusion that the Army did not desire the railroads to furnish piers or to

perform the unloading service; indeed, the proof showed that performance by the railroads of the unloading service would have been impracticable and would not have been permitted by the Army on any terms that would have been feasible. Thus, even if it is assumed (contrary to the well established rule) that the railroads were under an obligation to provide piers and unloading service, they were relieved of that obligation by reason of the fact that the Army chose to provide the facilities and to perform the service itself, and, in effect, prevented the railroads from discharging their asserted legal obligation. *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan American Corp.*, 304 U. S. 156; *United States* v. *Wabash R. Co.*, 321 U. S. 403.

There was no evidence before the Commission to support appellant's contention that the line-haul export rates charged the Army were unreasonable. The line-haul export rates were not made in contemplation of the payment of four cents per hundred pounds of freight or of any other amount for wharfage or unloading service; were not made in contemplation of the furnishing of such facilities or services; and contained no factor or increment to cover the cost of these facilities and services. The evidence before the Commission showed that the export rates to Norfolk are lower than maximum reasonable rates because they are depressed to the basis of the Baltimore export rates for competitive reasons.

The fact that the Army was charged no more than other shippers in the same situation, but, on the contrary, was charged less because of the special concession that permitted application of the export rate, is a complete answer to appellant's charge that the railroads have been unjustly enriched.

ARGUMENT.

I. The United States is Not Authorized to Institute an Action to Enjoin and Set Aside an Order of the Interstate Commerce Commission.

No suit can be brought to enjoin and set aside an order of the Interstate Commerce Commission except in compliance with the provisions of the Interstate Commerce Act and the Urgent Deficiencies Act, Act of October 22, 1913 (Ch. 32, 38 Stat. 208, 28 U. S. C. 41, 43-48).[6] *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485; *Lambert Co. v. Balt. & Ohio R. R. Co.*, 258 U. S. 377; *Venner* v. *Mich. Central R. R. Co.*, 271 U. S. 127; *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 523. The United States recognizes this principle and asserts that the right to maintain this action is conferred by the Urgent Deficiencies Act. (Appellant's Brief, pp. 14, *et seq.*)

This attempt of the United States to attack in the courts an order made by the Interstate Commerce Commission is unprecedented. So far as the reports disclose, this is the first time that the United States as plaintiff, has instituted an action *eo nomine* to enjoin and set aside an order of the Interstate Commerce Commission.[7] If Congress had

[6] The discussion in this brief, as in Appellant's Brief, is directed to the provisions of the Urgent Deficiencies Act as they existed at the time this suit was brought. The pertinent provisions of the Urgent Deficiencies Act, with certain changes in form, were incorporated into Title 28, United States Code by Public Law 773, 80th Congress, approved June 25, 1948, effective September 1, 1948.

[7] Appellant cites a number of cases as precedents for this action but in none of those cases did the United States bring an action *eo nomine* to enjoin and set aside an order of the Interstate Commerce Commission. For a discussion of the cases cited by appellant in this connection see pp. 40-42, 52-53, *infra*.

intended to authorize litigation of so novel and anomalous a character it may be assumed that Congress would have stated its intention in language so explicit as not to permit of misunderstanding or debate. Appellant is not able to point to any such explicit statement of Congressional intent. On the contrary, the language of the Interstate Commerce Act and the Urgent Deficiencies Act shows affirmatively that Congress did not intend to authorize the United States to enjoin, annul, suspend and set aside an order of the Interstate Commerce Commission.[8]

Section 17(9) of the Interstate Commerce Act provides that a suit to enjoin, suspend and set aside an order of the Interstate Commerce Commission may be brought "in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend or set aside orders of the Commission, but not otherwise." The provisions of law referred to in Section 17(9) as being "applicable in the case of suits to * * * enjoin, suspend or set aside orders of the Commission" are the provisions of the Judicial Code as it was amended and supplemented by the Urgent Deficiencies Act.

Section 207 of the Judicial Code as amended by the Urgent Deficiencies Act (28 U. S. C. 41(28)) provides that

[8] Appellant contends that there is no express limitation in the statute of the right of the United States to bring an action to set aside an order of the Interstate Commerce Commission and that the statute should not be interpreted in derogation of the rights of the United States unless those rights are "clearly and affirmatively" limited. (Appellant's Brief, p. 15) The fact that the statute requires that the suit be brought against the United States as the indispensable defendant is in itself a clear and affirmative limitation of the right of the United States to institute such an action. In any event the general canon of construction cited by appellant should be read in the light of the declaration of this Court in *United States v. Rice*, 327 U. S. 742, 749, "* * * it is clear that the United States cannot assert, by virtue of its sovereignty, a right of appeal which no statute has conferred, or which, if conferred, has been abolished."

the district courts of the United States shall have original jurisdiction of cases brought to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. The Urgent Deficiencies Act (28 U. S. C. 44) provides that in respect to cases brought to enjoin, set aside, annul or suspend an order of the Interstate Commerce Commission, the procedure in the district courts shall be as provided in Sections 45, 45a, 46, 47, 47a and 48 of Title 28 U. S. C. Of the sections so enumerated, Section 46 of Title 28 (Section 208 of the Judicial Code as amended) is the most important for present purposes.[9] That section provides:

> "Suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought in the district court *against the United States*." (Italics supplied)

The effect of Section 46 is to make the United States an indispensable party to any suit to enjoin or set aside an order of the Interstate Commerce Commission. *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485, 490; *Lambert Co.* v. *Balt. & Ohio R. R. Co.*, 258 U. S. 377, 382; *Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 164.

The United States is not only an indispensable party defendant in a suit brought to enjoin or set aside an order of the Commission; it is the *only* party that can be sued for this purpose. Under the provisions of Sections 212 and 213 of the Judicial Code, as amended by the Urgent Deficiencies Act (28 U. S. C. 45a) the Interstate

[9] The provision is now embodied in 28 U. S. C. 2322. In reenacting Section 46 of 28 U. S. C., the Act of June 25, 1948 omitted the provision that actions to enjoin an order of the Commission should be brought against the United States. The Revisor's Notes stated that the provision was omitted because it is now covered by Section 2322 of Title 28.

Commerce Commission may, if it chooses to do so, appear as a party to the action on its own motion and as of right. But whether the Commission is to appear and participate in the suit is a matter left wholly to the discretion and volition of the Commission; one who wishes to attack an order of the Interstate Commerce Commission has no right to name the Interstate Commerce Commission as a defendant in a suit brought for that purpose. The Commission cannot be compelled to appear in the litigation to defend its order, and it is always open to the Commission to abstain from the litigation and to leave the defense of its order to the Attorney General. Indeed, the statute places on the Attorney General, acting on behalf of the United States, the primary responsibility for the defense of the suit. See pp. 32-33, *infra*. If the Interstate Commerce Commission should be named as a party defendant and if the Commission should choose to make a motion to dismiss as against it, the motion should be granted. See *Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493; *Isbrandtsen-Moller Co.* v. *United States*, 14 F. Supp. 407, 411 (S. D. N. Y. 1936) aff. on other grounds 300 U. S. 139, 140.[10]

[10] In *Isbrandtsen-Moller Co.* v. *United States*, 14 F. Supp. 407 (S. D. N. Y. 1936) aff. 300 U. S. 139, 140, the plaintiff brought a suit in equity to enjoin an order made by the Secretary of Commerce in the exercise of functions formerly exercised by the United States Shipping Board Bureau, the functions having been transferred to the Department of Commerce by Executive Order. The applicable statutory provisions (46 U. S. C. A. 830) required that the suit to enjoin the Secretary's order be brought under the same provisions of the Urgent Deficiencies Act that apply to a suit to enjoin or set aside an order of the Interstate Commerce Commission. The plaintiff named as defendants not only the United States but also the Secretary of Commerce, the Department of Commerce, the Shipping Board Bureau of the Department of Commerce, the Director of the Shipping Board Bureau and the District Attorney. A motion was made to dismiss the suit as against the Department of Commerce and the Shipping Board Bureau and the Director of the Shipping

See also *United States v. Idaho*, 298 U. S. 105 and *United States v. Griffin*, 303 U. S. 226, 238-239.

In *Illinois Central R. R. Co. v. Public Utilities Commission*, 245 U. S. 493, certain carriers brought a suit to restrain State officials from interfering with the establishment and maintenance of intrastate rates which the carriers had adopted pursuant to an order of the Interstate Commerce Commission. The State officials filed a cross bill seeking to have the order of the Interstate Commerce Commission declared void and to enjoin the United States and the Commission from enforcing the order and the carriers from complying with it. The United States objected to the jurisdiction on the ground that the case was not brought in the district court where the petitioner resided in accordance with the venue provisions of the Urgent Deficiencies Act (28 U. S. C. 43). The court held that the United States had consented to be sued only in the district of the petitioner's residence and could not be sued elsewhere and that accordingly the cross bill could not be maintained against the United States. The State officials argued that even if the cross bill could not be maintained against the United States, it could be maintained against the carriers and the

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Board Bureau and the motion was granted. The district court said (14 F. Supp. 401, 411):

> "Thus the Department of Commerce was made to take over the functions of the Shipping Board. But it is a part of the executive establishment of the United States and a suit against it is in reality a suit against the United States. The United States was made a party to this suit and is a necessary party. 28 U. S. C. A. § 46; *Illinois Central Railroad Co. v. Public Utilities Commission*, 245 U. S. 493, 38 S. Ct. 170, 62 L. Ed. 425. As the United States has consented to be sued and is a party and neither one of its departments nor any subdivision of such department can have any interest in the action different from that of the United States itself, they appear to have no interest which will support the contention that they are proper parties, and the motion to dismiss as to them is granted."

Interstate Commerce Commission. This Court rejected that contention. The Court, referring to suits to set aside orders of the Interstate Commerce Commission, said (245 U. S. at p. 504):

> "By statute such suits are required to be brought against the United States * * *"

and held that because the suit could not be maintained against the United States it could not be maintained against either the carriers *or the Interstate Commerce Commission.* In dealing with this latter point, the Court said (245 U. S. at p. 505):

> "The claim is made that in any event the cross bills should have been retained as to the defendants therein other than the United States. But this is not an admissible view. As before indicated, the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public."

In *United States* v. *Idaho*, 298 U. S. 105, 109, this Court said:

> "This suit is not one brought to set aside for error or irregularity an order of the Commission on a matter within its jurisdiction. *In such a proceeding the United States is the only party named as defendant;* others interested become parties by intervention. See Commerce Court Act, June 18, 1910, c. 309, § 3, 36 Stat. 539, 542, Urgent Deficiencies Act, Oct. 22, 1913, c. 32, 38 Stat. 208, 219." (Italics supplied)

The United States argues that the statute gives the United States the right to name the Interstate Commerce Commission as a defendant. (Appellant's Brief, pp. 26-27). The decisions cited by the United States do not support this contention. On the contrary, in *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, one of the cases cited by the appellant, the opinion of this Court emphasized that in a suit under the Urgent Deficiencies Act to enjoin

or set aside an order of the Interstate Commerce Commission the United States should be named as the defendant.[11]

The argument that the United States has a right to name the Interstate Commerce Commission as a defendant is contradicted by the legislative history of the statute. The requirement that a suit to enjoin or set aside an order of the Commission be brought against the United States was first inserted in the statute by the Mann-Elkins Act of June 18, 1910, c. 309, 36 Stat. 542. The history of that statute shows that the requirement that the suit be brought against the United States was intended to prevent suits from being brought against the Interstate Commerce Commission as had been the practice prior to the enactment of the statute.[12]

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[11] Appellant also cites *Cargill, Inc.* v. *United States*, 44 F. Supp. 368 (N. D. Ill. 1942). Giving that decision full weight, it indicates nothing more than that in appropriate cases a plaintiff who is seeking to enjoin an order of the Interstate Commerce Commission may join as defendants carriers who are seeking to take affirmative action in reliance on the order. The decision has no bearing on the question of the right of a plaintiff to join the Interstate Commerce Commission as a defendant. It should be noted that the decision does not support the conclusion that in the case at bar the United States could have named the interveners as defendants. In this case the district court could not have ordered the interveners to make reparation to the plaintiff or given it any other relief as against them.

[12] See House Report 923, 61st Congress, 2nd Session, pages 3, 7, 159 and Senate Report 355, 61st Congress, 2nd Session, page 6. The House Report sets forth in full the message of President Taft recommending the passage of the Mann-Elkins Act; that message urged that all proceedings affecting orders and decisions of the Interstate Commerce Commission should be brought by or against the United States.

The statements in the Senate Report are particularly significant on this point. That report, after referring to the fact that in *Texas and Pac. Railway* v. *Interstate Commerce Commission*,

The appellant does not expressly argue that the United States has a right to bring a suit against the intervening railroads to annul the Commission's order, presumably because appellant recognizes that the argument could not be reconciled with the language of the statute. But appellant does appear to suggest at one point in its argument that the fact that the railroads have intervened in this case supplies a basis for holding that the United States has a standing to maintain this litigation. (Appellant's Brief, p. 28). The logical infirmity of this argument is obvious. Either the United States had the authority to institute this suit at the moment the petition was filed or it did not. If at that point of time the United States had no standing to file the petition, the subsequent appearance of the Interstate Commerce Commission and the subsequent intervention of the railroads are both immaterial.[12] The Urgent Deficiencies Act cannot be given one meaning in a case in which the Interstate Commerce Commission chooses to ap-

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162 U. S. 197 the Supreme Court had held that the Interstate Commerce Commission was a body corporate with legal capacity to be a party plaintiff or defendant in the Federal courts, and that consequently, suit to set aside orders of the Commission had been brought against the Commission, said (Op. Cit. page 6):

> "The bill terminates this condition by requiring all proceedings to review orders of the Commission to be brought against the United States and by vesting the control of all such proceedings in the Department of Justice."

See also Congressional Record, Volume 45, pp. 157 f, 5514-5522, 5522-5523, 6346-6347, 6391, 6457-6462.

Cf. *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 22-23.

[12] Intervention presupposes a suit properly brought. See the cases cited in footnote 32, p. 51, *infra*.

pear and answer, and quite a different meaning in a case in which the Interstate Commerce Commission fails or refuses to appear. The appearance of the Interstate Commerce Commission and the intervention of the railroads are fortuitous circumstances in the sense that neither act could be compelled by the appellant; the only person the United States can possibly have the right to sue in this proceeding is the United States. Thus, the assertion by the United States of the right to sue the United States raises a question that must be decided quite apart from and without regard to the wholly voluntary appearance of the Interstate Commerce Commission and the intervening railroads.'

Since a suit to enjoin or set aside an order of the Interstate Commerce Commission must be brought against the United States (and cannot be brought as of right against anyone else), it follows that the appellant is urging upon this Court a construction of the statute that would make it possible for litigation to arise in which the United States would be at once the only plaintiff and the only defendant and in which the Attorney General would be required to represent both sides of the controversy.

The requirement of the Urgent Deficiencies Act that a suit to enjoin or set aside an order of the Interstate Commerce Commission shall be brought against the United States is in itself enough to require the rejection of appellant's contention that the United States is entitled to maintain this action. It is no answer to the language of the statute to say, as appellant does, "The matter is a practical one, which should be governed by realities and not by technicalities or legal fictions," and that "the practical fact here is that the United States is the plaintiff, and in no real sense a defendant." (Appellant's Brief, p. 29) The notion, implicit in these statements, that the United States, as a legal entity, has legal interests hostile to those of the Interstate Commerce Commission cannot be reconciled with the provisions of the Interstate Commerce Act and the Urgent Deficiencies Act, nor can it be reconciled with what

would seem to be the obvious fact that when the Interstate Commerce Commission makes an order it acts as an agency of the United States, its action is the action of the United States, and the United States, as a sovereign, has a direct and substantial interest in sustaining the validity of the order.[14]

Furthermore, the assertion that the United States is the plaintiff in this action and is "in no real sense a defendant" is hardly consistent with what appellant chooses to regard as the "realities" of the litigation. If we are to adopt the appellant's theory that the United States has a multiple and divisible legal personality and that the interests of different agencies and departments of the Federal Government must be regarded as diverse and separate for the purposes of litigation, then this action must be regarded as an action in which the War Department is the plaintiff and the Interstate Commerce Commission is the defendant. Viewed in that light plaintiff's contention amounts to this: that the Urgent Deficiencies Act authorizes the Attorney General, acting in the name of the United States, but at the behest of some department or agency of the Federal Government that is aggrieved by an order of the Interstate Commerce Commission, and who is in fact the real party in interest (in this case the War Department), to bring a suit, in the name of the United States, and nominally against the United States, but in fact against the Interstate Commerce Commission, to enjoin or set aside the Commission's order.

This construction of the statute involves two erroneous assumptions: (1) That the requirement of the Urgent Deficiencies Act that a suit to enjoin or set aside an order of the Interstate Commerce Commission shall be brought against the United States is a purely formal requirement that may be complied with and then disregarded and (2) That the provisions of the Judicial Code and Urgent Deficiencies Act are intended to authorize the

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[14] See pp. 37-38, *infra*.

various agencies and departments of the Federal Government to institute judicial proceedings in the name of the United States to annul orders of the Interstate Commerce Commission.

So far as concerns the first of these assumptions this Court has refused to accept the contention that the requirement that suit must be brought against the United States is purely formal or nominal in character. In *North Dakota v. Chicago & N. W. Ry. Co.*, 257 U. S. 485, the State of North Dakota instituted an original action in the Supreme Court to enjoin the enforcement of an order of the Commission. In support of its suit, the State argued that the statute did not provide the exclusive method of review and that an action to set aside an order of the Commission did not have to be brought against the United States. The Supreme Court rejected the State's argument saying (257 U. S. at p. 490):

> "As to public policy, Congress has indicated the policy of the United States. For although it is argued that the requirement that the United States should be made a party is a mere matter of procedure for the purpose of giving the Department of Justice control, we cannot limit the significance of the Judicial Code, § 211, by such a speculation. The language of the section shows that public interests were before the mind of Congress, and that in its opinion an order made in the public interest should not be hindered from going into effect until the representative of the public had been heard. It appears to us that this view is so reasonable that it should be accepted by this Court even if not bound."

The second assumption implicit in appellant's argument, that is, that Congress has authorized litigation between the several agencies and departments of the Federal Government and the Interstate Commerce Commission, cannot be reconciled with the provisions of the statute. If Congress had intended to authorize litigation between the various agencies and departments of the Executive Branch of the

Government and the Interstate Commerce Commission surely it would not have provided, as it did in the Urgent Deficiencies Act, that a suit to enjoin or set aside an order of the Commission should be brought against the United States.

Apart from the requirement that the suit be brought against the United States there is another provision of the statute that is inconsistent with the notion that Congress intended to authorize litigation between the agencies and departments of the Executive Branch of the Government, on the one hand, and the Interstate Commerce Commission, on the other. Sections 212 and 213 of the Judicial Code (28 U. S. C. 45a) provide that "the Attorney General shall have charge and control of the interests of the Government" in any case brought to enjoin or set aside an order of the Interstate Commerce Commission.[15] It is inconceivable that Congress would have inserted this provision in a statute that was intended to authorize litigation between the United States and the Interstate Commerce Commission. If the statute authorizes such litigation, where can it be said that the interests of the Government lie? Is the Attorney General acting in the interests of the Government when, on behalf of the United States as petitioner, he attacks the Commission's order? Is he acting in the interests of the Government when, on behalf of the United States as defendant, he stands neutral? Are the interests of the Interstate Commerce Commission as defendant the interests of the Government, or are the interests of the Interstate Commerce Commission adverse to those of the Government?

The inference to be drawn from the fact that the statute directs that the Attorney General shall have charge and control of "the interests of the Government" is not weakened by those provisions of the Judicial Code and the Urgent Deficiencies Act (referred to in Appellant's Brief, pp. 21-23)

[15] The substance of this provision is now contained in 28 U. S. C. 2323.

which give to the Interstate Commerce Commission and other interested parties the right to intervene and to participate in the proceeding through their own counsel, and which provide that the Attorney General shall not dispose of or discontinue the suit over the objection of any party who has so intervened (See Sections 212 and 213 of the Judicial Code, 28 U. S. C. 45a)[16] These provisions of the statute define with particularity the extent to which the Interstate Commerce Commission may be regarded as a separate and distinct entity with power to act independently of the Attorney General in litigation brought to attack the validity of its orders. The language of these provisions does not authorize a suit to be brought either by or against the Interstate Commerce Commission, nor does the language give anyone the right to sue the Interstate Commerce Commission or the right to compel the Interstate Commerce Commission to come into court to defend its orders. The fact that Congress defined with particularity and without ambiguity the extent to which the Commission may act independently in litigation is in itself a reason for rejecting a broader interpretation of the statute that would permit the United States or any agency or department of the Government to sue the Interstate Commerce Commission as a separate and distinct entity.

In the single instance in which the Congress has chosen to authorize an agency of the Government to bring judicial proceedings to attack orders of the Interstate Commerce Commission, Congress conferred that authority in plain and explicit terms. Section 201 of the Agricultural Adjustment Act of 1938, 7 U. S. C. 1291, provides:

> "(a) the Secretary of Agriculture is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission. Before hearing or disposing of any complaint (filed by

[16] See 28 U. S. C. 2323.

any person other than the Secretary) with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, the Commission shall cause the Secretary to be notified, and, upon application by the Secretary, shall permit the Secretary to appear and be heard.

"(b) if such rate, charge, tariff, or practice complained of is one affecting the public interest, upon application by the Secretary, the Commission shall make the Secretary a party to the proceeding. In such case the Secretary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination. The liability of the Secretary in any such case shall extend only to liability for court costs."

It should be noted that this statute provides that in certain circumstances the Secretary shall have "the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination." [17] It is not necessary in this case to determine the scope or the meaning of this language.[18] The significant fact is that there is no comparable or analogous language in the Interstate Commerce Act, the Judicial Code or the Urgent Deficiencies Act that authorizes the United States, or any of its agencies or departments, to bring suit to enjoin or set aside an order of the Interstate Commerce Commission.[19]

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[17] It is significant that the statute provides that the Secretary shall be liable for court costs; the United States never incurs liability for costs.

[18] Cf. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, discussed at pp. 40-41, *infra*.

[19] The provisions of the Agricultural Adjustment Act of 1938 may be compared with Section 16 of the Bituminous Coal Act of 1937 (15 U. S. C. 846) and Section 1 of the Stabilization Act of 1942 (50 U. S. C. App. 961) which authorized Government agencies to participate in proceedings before the Interstate Commerce Com-

The legislative history of the Mann-Elkins Act supports the conclusion that the United States is not authorized to bring suit to strike down an order of the Interstate Commerce Commission. The provisions of the statute that give the Attorney General control of the litigation and that permit the Interstate Commerce Commission to appear as of right were thoroughly debated in Congress at the time that the Mann-Elkins Act was passed. The requirement of the statute that suits to enjoin the orders of the Commission be brought against the United States and the provision that the litigation should be under the control of the Attorney General were attacked vigorously by members of both Houses of Congress who were in favor of amending the bill so as to provide that the suits should be brought against the Interstate Commerce Commisssion *eo. nomine* and should be defended by the Commission itself, and not by the Attorney General. Attempts to amend the bill so as to provide that the suits should be brought against, and defended by, the Commission were defeated on the floor of both Houses.[20] The present provision of the law giving

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mission. Neither Section 16 of the Bituminous Coal Act nor Section 1 of the Stabilization Act of 1942 authorized the Government agency involved to seek judicial review of a Commission order.

No reported case has been discovered in which the Bituminous Coal Commission, or the Director of the Office of Price Administration, or the Director of Economic Stabilization sought to bring a suit under the Urgent Deficiencies Act to enjoin, suspend, set aside, or annul an order of the Interstate Commerce Commission. The Price Administrator attacked orders of the Interstate Commerce Commission in *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, and *North Carolina* v. *United States*, 325 U. S. 507, but in each of these cases the proceeding to enjoin or set aside the Commission's order was initiated by another.

[20] 45 Congressional Record 5514-5522, 5522-5523, 6346-6347, 6389-6409, 6444-6462.

It is significant that in the 80th Congress the Committee on Judiciary of the House of Representatives, acting on the recommendation of the Attorney General, refused to recommend legislation

the Interstate Commerce Commission the right to appear in any litigation in which the validity of one of its orders is attacked was adopted as a compromise to satisfy those members of Congress who feared that the Attorney General might not always vigorously defend orders of the Commission.

In the course of a protracted debate, in which all aspects of this problem were discussed, no member of Congress suggested that it was the intention of Congress to authorize the Attorney General to institute suit against the Interstate Commerce Commission to invalidate the Commission's orders. On the contrary, the debates are replete with statements that it was the duty of the Attorney General to defend the Commission's orders in all circumstances.[21] The

providing that hereafter proceedings to enjoin orders of the Interstate Commerce Commission should be brought against the Commission and defended by the Commission. See House Report No. 1019, 80th Congress, Second Session, on H. R. 1468.

[21] Senator Root, who was active in behalf of the bill was particularly explicit on this point. Senator Bristow of Kansas raised the question whether the Attorney General would be required to defend an order of the Commission if he believed that the order was not justified. The following colloquy ensued (45 Congressional Record 4104):

> "MR. ROOT. Mr. President, I will answer that without any hesitation or doubt. The Attorney-General would be bound upon all and the highest considerations of his professional honor and his official duty to defend the order of the Interstate Commerce Commission in all courts having jurisdiction to review it.
>
> "MR. BRISTOW. Then, he would not have any supervisory authority as to whether or not it should be defended?
>
> "MR. ROOT. Certainly not. It is his business to defend. He is no judge; he is no legislator; he is no reviewing authority."

Another significant colloquy occurred between Senator Heyburn of Idaho and Senator Cummins. Senator Heyburn commented on

debates also contain numerous statements by members of Congress showing that they assumed that there was iden-

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that provision of the bill which provided that all suits which theretofore had been brought by or against the Interstate Commerce Commission should be brought by or against the United States. His comments led to the following colloquy with Senator Cummins (45 Congressional Record 6461):

"MR. HEYBURN. May it not occur that the United States, represented by the Attorney-General, would be attacking the Interstate Commerce Commission, for the language here is 'by or against the United States?' It would certainly be intolerable to have one of the branches of the Government attacking another branch in the courts.

"MR. CUMMINS. Precisely. I think, not under the second paragraph conferring jurisdiction upon the court of commerce, but upon other branches of the law and upon other subjects, the very situation which the Senator from Idaho has suggested may arise.

"MR. HEYBURN. Under Section 4, under the provision that—

"From and after the passage of this act all cases and proceedings in the court of commerce which, but for this act, would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States.

"I have some difficulty in adjusting the language 'shall be brought by or against the United States.' Then it goes on to provide for the Attorney-General representing the cause. Suppose this suit attacking the judgment of the Interstate Commerce Commission is brought against the United States in what position would the Interstate Commerce Commission be placed? It would be defending against a proceeding brought by the United States in effect.

"MR. CUMMINS. Mr. President, I can not conceive of any such suit as that just mentioned by the Senator from Idaho."

See also 45 Congressional Record 1574, 4938, 5232, 5416, 6456.

tity, and not diversity, of interest between the United States and the Interstate Commerce Commission.[22]

There is no substance in appellant's contention that the legislative history of the Mann-Elkins Act shows that Congress contemplated that the United States might bring suits to set aside the Commission's orders. In support of this argument appellant makes two points: In the first place appellant refers to the fact that an amendment that would have required the Attorney General to defend the Commission's orders in all cases was rejected on the floor of the House of Representatives. (Appellant's Brief pp. 19-21, fn. 7) The fact is that this amendment had nothing to do with the question whether the United States should be authorized to institute suits attacking the orders of the Interstate Commerce Commission and the Congressional debate on this amendment supplies no justification for the inference that appellant seeks to draw.[23]

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[22] See Congressional Record, Volume 45, pp. 4104, 4938, 5516, 5517; Part 6, 6391, 6457. On this point, Senator Sutherland of Utah said (op. cit. 6457):

> "When the Interstate Commerce Commission after a hearing makes an order it becomes in substance and effect an order of the Government of the United States."

[23] Appellant's inference seems to be that the amendment was defeated because the members of the House of Representatives believed that the Attorney General should be free to institute suits attacking the Commission's orders. The fact is that it is not possible to determine with precision the grounds on which the amendment was rejected. Some members of the House objected to the amendment on the ground that it was unnecessary and that it was the duty of the Attorney General to defend the Commission's orders in any event (45 Congressional Record 5525). Even Representative Norris who opposed the amendment said that in his judgment it "adds absolutely nothing in effect to the bill * * *" (45 Congressional Record 5526). The amendment also provided that every order of the Commission "shall be presumed to be lawful and proper". Some members objected to this pre-

In the second place appellant argues that the fact that the bill was amended to permit the Interstate Commerce Commission to intervene and to appear in defense of its own orders shows that the Congress intended to authorize the United States to bring suits attacking the orders of the Commission (Appellant's Brief, pp. 24-25). An examination of the legislative history of the statute shows that this amendment was adopted as a compromise between a group of members of Congress who feared that the Attorney General might not always be vigorous in defense of the Commission's orders and therefore wished to give the Commission sole responsibility for the defense of its orders, and another group who believed that the Attorney General should have complete control of the defense of the Commission's orders.[24] As between the two groups there was no difference of opinion on the principle that the orders of the Commission should be vigorously defended. It would doubtless come as a surprise to the members of both groups to learn that their resolve that the orders of the Commission should be vigorously and strongly defended is now construed as evidence of an intent to authorize the Attorney General to institute suits to invalidate the Commission's orders.

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sumption (45 Congressional Record 5527) and it may be assumed that they voted against the amendment on that ground. Some members objected to the amendment on the ground that if a shipper attacked an order made by the Commission the Attorney General should be free to decide for himself whether he would defend the order. Those who took this position, however, made it clear that they were thinking of cases in which a shipper instituted a judicial proceeding attacking the Commission's order. There was no suggestion that the Attorney General could initiate a suit to strike down the Commission's order. (45 Congressional Record 5525-5527).

[24] 45 Congressional Record, 4514, 4604-4607, 5514-5523, 6346-6347, 6389-6409, 6444-6462.

The appellant argues that the right of the United States to maintain this action is sustained by *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671 and *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. In the first of these cases the Inland Waterways Corporation brought suit against the United States under the Urgent Deficiencies Act to set aside an order of the Commission. In the second case the Inland Waterways Corporation and the Secretary of Agriculture brought separate suits attacking an order of the Interstate Commerce Commission. In neither of these cases was the question of the jurisdiction of the court to entertain a suit brought by the United States, or one of its instrumentalities, against the United States to set aside an order of the Interstate Commerce Commission raised, briefed or argued either in the lower court or in this Court. In fact, in the *Mechling* case the brief filed on behalf of the United States and the Department of Agriculture in this Court stated: "* * * The right of the United States to bring suit in the first instance * * * is not presented in this case."[25] Accordingly, these decisions cannot be regarded as authoritative on the jurisdictional issue now presented. *Ayrshire Corp.* v. *United States*, 331 U. S. 132, 137.[26] In any event it should be noted

[25] See brief for the United States and the Department of Agriculture in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, at p. 12, fn. 18.

[26] In *Ayrshire Corp* v. *United States*, 331 U. S. 132, 137, this Court, in dealing with another question arising under the Urgent Deficiencies Act, said:

> "The mere fact that the case was entertained by this Court is no basis for considering it as authoritative on the jurisdictional issue, it being the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the issue was ignored. *United States* v. *More*, 3 Cranch 159, 172; *Snow* v. *United States*, 118 U. S. 346, 354-355; *Cross* v. *Burke*, 146 U. S. 82, 87; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236; *Arant* v. *Lane*, 245 U. S. 166, 170."

that the Inland Waterways Corporation is specifically authorized by statute to sue, and to be sued, in its corporate name, (See 49 U. S. C. 155 (b)) and that the suit brought by the Secretary of Agriculture in the *Mechling* case was specifically authorized by Section 201 of the Agricultural Adjustment Act of 1938, 7 U. S. C. 1291, which has been discussed at pp. 33-34, *supra*. In each of these cases, therefore, it was possible to find Congressional authorization for suit which is lacking in the case at bar.[27]

The appellant also points out that in a number of cases the Attorney General has aligned himself on the side of a plaintiff who has been attacking the validity of orders of the Interstate Commerce Commission and asserts that this action "has neither been questioned nor criticized by this court." (Appellant's Brief, p. 25). But in all of the cases

[27] The appellant also cites *United States* v. *Public Utilities Commission*, 151 F. (2d) 609 (App. D. C. 1945). The jurisdictional issue was not raised or argued in that case. Accordingly, the principle announced in *Ayrshire Corp.* v. *United States*, 331 U. S. 132, 137 applies. (See Footnote 26, p. 40, *supra*) In any event, the statute involved in the *Public Utilities Commission* case differed substantially from the statutes under consideration here. In that case, the Court of Appeals for the District of Columbia held that the United States was entitled, as a consumer of electric power, to maintain an appeal under Section 43-705, D. C. Code (1940) which provides that "any public utility" or "any other person or corporation" affected by an order of the Public Utilities Commission of the District of Columbia may file a petition of appeal in the District Court of the United States for the District of Columbia. That statute did not require that the appeal be filed against the United States. On the contrary, the appellate procedure was conducted against the Public Utilities Commission *eo nomine*. There is no basis for assuming, as petitioner does, that the Court of Appeals would have decided the case as it did if the statute involved had required that the proceeding be instituted against the United States.

of this kind cited by appellant (except *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671 and *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567) the suit was instituted by a private person pursuant to the specific authorization of the Urgent Deficiencies Act. The fact that in cases in which the institution of a suit by a private person was plainly authorized by statute, the Attorney General has chosen not to defend the Commission's orders; has no logical relationship to the proposition that the Attorney General, acting in the name of the United States, is authorized to institute a suit against the United States to invalidate an order of the Interstate Commerce Commission. In short, these cases have no relevancy to the issue of the right of the United States to sue itself to set aside an order of the Interstate Commerce Commission.

Finding no comfort in the words of the Interstate Commerce Act, the Judicial Code, or the Urgent Deficiencies Act, or in the legislative history of these statutes, the appellant seeks to support the asserted right of the United States to maintain this action by an appeal to considerations of expediency. Appellant asserts that the United States is one of the largest shippers and that it is not to be assumed that Congress "intended to withhold from the United States, where its own pecuniary interests are directly or substantially involved, the right of review which has been conferred upon private parties." (Appellant's Brief, p. 16) This is an argument that the statute should be construed so as to give to the United States a remedy that is available to all other shippers.

It cannot be assumed, however, that Congress intended to permit the United States to bring a suit under the Urgent Deficiencies Act to enjoin or set aside an order of the Commission merely because every other shipper has that remedy. An examination of the provisions of the Interstate Commerce Act shows that Congress did not intend

to treat the United States and all other shippers alike.[25] The statute gives to the United States a number of advantages that are not available to private shippers. For example, under Section 22 of the Interstate Commerce Act the United States may enjoy rates that are lower than those in the published tariffs that are charged all other shippers. The right of the United States to bargain for and to receive the benefit of rates lower than those charged other shippers is also recognized by Section 321 of Title 3 of the Transportation Act of 1940 (49 U. S. C. 65). Section 322 of the same statute gives the United States the right, not given to private shippers, to deduct the amount of any overpayment to a carrier from any amounts subsequently found to be due to the carrier (49 U. S. C. 66). Under Section 3(2) of the Interstate Commerce Act (49 U. S. C. 3(2)) the United States, and its departments and agencies, unlike all other shippers, may make arrangements with the carriers for the transportation of freight on credit. The existence of these statutory provisions that give to the United States benefits and advantages not enjoyed by a private shipper, is inconsistent with the assumption that Congress intended that the United States and all other shippers should be on a plane of absolute equality.

The argument that the United States must have the right to institute a suit to enjoin or set aside an order of the Interstate Commerce Commission because every other shipper has that remedy is the same kind of

[25] As to a remedy that the statute gives to both the United States and private shippers, the United States must take the remedy on the same basis and subject to the same restrictions that apply in the case of a private shipper, but that is not to say that the United States and private shippers stand on the same plane so far as concerns the existence of rights and remedies under the statute. The United States has rights and remedies not available to private shippers; on the other hand the right to resort to the court to annul an order of the Commission is a right that has been conferred on private shippers and not on the United States.

argument that the Supreme Court rejected in *United States v. Cooper Corp.*, 312 U. S. 600. In that case the Court held that Section 7 of the Sherman Act does not permit the United States to bring a suit for triple damages even though that remedy is open to every other natural and corporate person in the United States. There the Government argued (as appellant argues in this case) that Congress could not have intended to deny the United States a remedy that was available to private persons. The Court rejected this contention. The Court pointed out that the Sherman Act gave to the Government certain remedies that were not available to private persons, and then said (312 U. S. 600, at p. 608)[29]

> "* * * we cannot hold that since a private purchaser is given a remedy for his losses in treble damages, the United States should be awarded the same remedy."

The argument in this brief has been made with particular reference to the words of the relevant statutes and to the legislative history of the statutes. The statement of the argument in these terms should not be permitted to obscure the fact that this attempt of the United States to attack an order made by one of its own agencies raises an important issue of public policy. The Interstate Commerce Commission is the body that Congress has created and authorized to regulate the transportation industry in accordance with

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[29] Appellant attempts to distinguish the *Cooper* case by asserting that, unlike the Sherman Act, "the terms and history of the Urgent Deficiencies Act do not indicate a purpose to deprive the United States of the right to seek review of Commission orders in circumstances where that right is available to all other shippers." (Appellant's Brief, p. 18). Appellant overlooks the fact that the argument made on behalf of the United States in the *Cooper* case was stronger in one important respect than the argument that appellant makes in the instant case: In the *Cooper* case this Court could have upheld the right of the United States to sue without holding that the United States was authorized to institute a suit against itself.

standards that Congress has prescribed. There is nothing novel or startling in the suggestion that when the Commission acts within the sphere of its authority its determinations are authoritative and final in so far as they touch the financial interests of other agencies and departments of the Government. Congress has not heretofore adopted the policy of permitting or authorizing departments or agencies of the Executive Branch of the Government to resort to the Federal courts to invalidate orders issued by the regulatory agencies that Congress itself has established merely because those orders happen to affect adversely the financial interests of the departments or agencies. It is conceivable that Congress itself, by statute, might abandon or modify this policy. But any proposal to do so, either generally or with reference to particular situations, would raise important questions of principle and practice that only Congress can properly answer. The nature of these questions can be illustrated by a reference to the instant case.

Under what conditions and in what circumstances is the Attorney General entitled to sue to enjoin the enforcement of an order made by the Interstate Commerce Commission? Can such a suit be brought whenever the Attorney General believes that the Interstate Commerce Commission has not correctly appraised the facts in a particular situation or has made an error of law, without regard to whether the financial interests of some branch or agency of the Government are injured, or can the Attorney General act only at the behest of an agency of the Government that can prove a financial interest comparable to the interest that must be shown by a private person who wishes to attack the Commission's order? Who is to decide whether the suit is to be brought—the agency that asserts it has been injured by the Commission's order, or the Attorney General? What part is the Attorney General to play in such litigation? Is he to be required to represent the complaining agency or is he to be required to defend the order of the Interstate Commerce Commission? What are the interests of the United States in such litigation and who is to speak for the United States?

The acceptance of the strained and incongruous interpretation of the Urgent Deficiencies Act that appellant is now urging upon this Court will create a situation in which these questions will require answers. These are not questions that can be answered by reference to the provisions of the Interstate Commerce Act, the Judicial Code, or the Urgent Deficiencies Act in their present form. They are questions that are essentially legislative in character and that call for the judgment of Congress. The fact that the questions are not resolved by the statutes suggests that Congress never intended to authorize the kind of litigation that has been attempted in this case and the fact that appellant's contention raises these questions and, if accepted, will require their decision, shows that appellant is now asking this Court to engage in the declaration of legislative policy.

II. An Action by the United States Against the United States and the Interstate Commerce Commission to Enjoin and Set Aside an Order of the Commission Does Not Present a Justiciable Case or Controversy.

In the preceding section of the brief we have pointed out that the language of the Judicial Code and the Urgent Deficiencies Act and the legislative history of those statutes, taken together, show that Congress has not authorized the United States to sue the United States for the purpose of enjoining or setting aside an order of the Interstate Commerce Commission. Apart from the language of these statutes and their legislative history there is another reason for rejecting appellant's construction of the statutes. Litigation in which the United States attempts to sue the United States and the Interstate Commerce Commission does not present a case or controversy within the meaning of Article III, Section 2 of the Constitution, which defines the boundaries of Federal judicial power.

There cannot be a justiciable controversy unless there are separate and distinct parties with adverse legal inter-

ests that are affected by the dispute that is to be adjudicated. There are two aspects of this principle that are important in the instant case. In the first place there must be diversity of parties; the same person cannot be both plaintiff and defendant at the same time in the same action. *Lord* v. *Veazie*, 8 How. 251; *Cleveland* v. *Chamberlain*, 1 Black 419; *Wood-Paper Company* v. *Heft*, 8 Wall. 333; *Phoenix Insurance Co.* v. *Erie Transportation Co.*, 117 U.S. 312-322. In the second place, there must be a real diversity of legal interests; it is not enough for different parties to be before the court, or for a dispute to be presented to the court if, in fact, the litigants or disputants represent the same legal entity or interest. In short, the courts will look beyond the parties who appear in the litigation to determine whether in fact they represent different and adverse legal interests. *Wood-Paper Company* v. *Heft*, 8 Wall. 333; *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U.S. 300; *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 241. Cf. *Indianapolis* v. *Chase National Bank*, 314 U.S. 63.

In reliance upon the principle that a justiciable controversy requires the presence of separate and distinct parties with adverse legal interests, the lower Federal courts have held, in cases analogous to the case at bar, that an instrumentality of the United States cannot bring an action against the United States and that one agency of the United States cannot bring an action against another. *Globe & Rutgers Fire Insurance Co.* v. *Hines*, 273 Fed. 774 (C.C.A. 2d 1921) *cert. den.* 257 U.S. 643; *Defense Supplies Corp.* v. *United States*, 148 F. (2d) 311 (C.C.A. 2d 1945), *cert. den.* 326 U.S. 746; *Defense Supplies Corp.* v. *American-Hawaiian S. S. Corp.*, 64 F. Supp. 459 (S.D.N.Y. 1945).[30]

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[30] In *Defense Supplies Corp.* v. *United States*, 148 F. (2d) 311 (C. C. A. 2d 1945), *cert. den.* 326 U. S. 746, an action was brought by Defense Supplies Corporation, an instrumentality of the United States, against the United States, under the Suits in Admiralty Act, to recover the value of a cargo damaged in shipment on a vessel owned by the United States. The court, dismissing the action on the ground that it was in reality a suit by the United States against itself, said (pp. 312-313):

The action that the United States is attempting to maintain here does not satisfy the standards that should be applied to determine the existence of a justiciable controversy. There is no difference in identity between the United States as plaintiff, on the one hand, and the United States and the Interstate Commerce Commission as defendants, on the other. The diversity of identity necessary to sustain jurisdiction cannot be manufactured by the device of naming the Interstate Commerce Commission as a defendant. The fact is that the provisions of the Judicial Code and the Urgent Deficiencies Act do not give the United States, or any other plaintiff, the right to name the Interstate Commerce Commission as a defendant in a suit brought to attack one of the Commission's orders. In the

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"It seems clear to us that the complete ownership of the Defense Supplies Corporation by the United States shows this to be nothing more than an action by the United States against the United States. The Act would appear to contemplate no such action. Sections 1 and 2 indicate that the United States shall be the defendant. And section 3 states that such suits as are brought under the Act shall proceed according to the principles of law and rules of practice obtaining in like cases between private parties. In private litigation the plaintiff and defendant cannot be the same. For, in that event, there is no real case or controversy. We conclude, therefore, that the Defense Supplies Corporation cannot maintain a suit against the United States under the Suits in Admiralty Act."

In its brief appellant asserts that *Davis* v. *Donovan*, 265 U. S. 257, casts doubt upon the validity of the *Globe & Rutgers* case. The decision in the *Davis* case and in *Missouri-Pac. R. R. Co.* v. *Ault*, 256 U. S. 554 (which the *Davis* case followed and applied) turned on the construction given by this Court to the statutes regulating suits by and against the railroads after they were taken over by the United States in the first World War. These decisions cast no doubt on the general principle that a suit by the United States against itself or against one of its agencies or departments does not raise a justiciable case or controversy.

Mann-Elkins Act Congress expressly provided that any suit to set aside an order of the Interstate Commerce Commission must be brought against the United States. The avowed purpose of this provision of the statute was to reverse the prior holding of this Court in *Texas and Pac. Railway* v. *Interstate Commerce Commission*, 162 U.S. 197, that the Interstate Commerce Commission was a body corporate with legal capacity to be a party plaintiff or defendant in the Federal courts. See pp. 27-28, *supra*. The fact that the Interstate Commerce Commission is given an independent status for certain limited purposes in litigations involving the validity of its orders (see pp. 32-33, *supra*) does not in any way impair the validity of the conclusion that Congress has provided that the Commission shall not be regarded as an independent legal entity for the purpose of the institution of litigation attacking the validity of its orders.

But even if it should be assumed that the United States and the Interstate Commerce Commission can properly be regarded as separate and distinct legal entities for the purpose of this litigation, the appellant's action would nevertheless not present a justiciable controversy because there can be no diversity of legal interest between the United States as plaintiff, on the one hand, and the United States and the Interstate Commerce Commission as defendants, on the other. It is true that the order of the Interstate Commerce Commission that appellant seeks to review is an order that denies the War Department reparation and thereby adversely affects the financial interests of that Department. But it is equally true that the order made by the Interstate Commerce Commission is an order that it made as an agency of the United States and on behalf of the United States. Appellant seems to assume that financial interest of the War Department is one of the "actualities" of the litigation, but that the interest of the United States as a sovereign in the validity of the orders of the Interstate Commerce Commission is a mere form or fiction

that can be disregarded. There is no rational basis for this assumption. It may be doubted whether it is proper to regard the United States as possessing a multiple personality or to make a distinction between those actions that the United States takes in its governmental capacity and those that it takes in its proprietary capacity. Cf. *Graves* v. *N. Y., ex rel. O'Keefe*, 306 U.S. 466, 477; *Fed. Land Bank* v. *Bismarck Co.*, 314 U.S. 95, 102. But even if this distinction is assumed to have vitality, neither logic nor authority supports appellant's assumption that the financial interests of the War Department are by definition the interests of the United States while the interest of the Interstate Commerce Commission in the validity of its order is in some way different from and adverse to the interests of the United States. There is no escape from the conclusion that the financial interest of the War Department and the interest of the Interstate Commerce Commission in the defense of its orders are both interests of the United States and that because of this identity of interest as between the plaintiff and the defendants in this litigation there exists no cause or controversy of which the Federal courts can properly take cognizance.

In dealing with this aspect of the case appellant casts its argument in a form designed to create the impression that the justiciable controversy in this case is between the United States, on the one hand, and the intervening railroads, on the other. But the United States did not bring this action against the intervening railroads; it did not name the intervening railroads as defendants and it did not ask the court below to grant it relief as against the intervenors. The statute does not authorize the United States or any other plaintiff to sue railroads for the purpose of enjoining or setting aside an order of the Interstate Commerce Commission. The fact is that in the particular circumstance of this case there is no affirmative relief as against the intervening railroads that the United

States could appropriately have sought or that the court below was competent to give.[31]

Admittedly the intervening railroads and the War Department were engaged in a controversy before the Interstate Commerce Commission, but this controversy is not now before the Court for decision. That controversy was terminated by the Commission's order which was, in itself, an exercise of the sovereign power of the United States. When the United States resorted to the district court for relief its attack was directed against the order made by the Interstate Commerce Commission and not against the intervening railroads. We submit that the jurisdictional question should be decided by reference to the character and purpose of the cause of action that the United States is now attempting to assert and that the character and the purpose of that cause of action cannot be transformed so as to meet the requirements of the Constitution merely by reason of the fact that the institution of the action was preceded by a dispute between the War Department and the intervening railroads.[32]

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[31] The intervening railroads were not threatening to take any affirmative action on the basis of the Commission's order which the United States could ask the court below to enjoin, nor did the Commission's order confer any affirmative rights upon the intervening railroads. The only effect of the Commission's order was to deny the request of the War Department that it be awarded reparations.

[32] There is another reason for rejecting the suggestion that the intervention of the railroads has created a justiciable controversy. Intervention cannot confer jurisdiction if a justiciable controversy did not exist in the original action. Intervention presupposes an action duly brought. If jurisdiction is lacking at the commencement of the suit, it cannot be conferred by intervention. *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 501; *Texas Cement Co.* v. *McCord*, 233 U. S. 157, 163-164; *Light Boudoir Co.* v. *Karatz*, 262 U. S. 77, 85-86; *Pianta* v. *H. M. Reich Co.*, 77 F. (2d) 888, 890 (C. C. A. 2nd 1935) *Kendrick* v. *Kendrick*, 16 F. (2d) 744 (C. C. A. 5th 1926) *cert. den.* 273 U. S. 758; *Cohn* v. *Cities Service Co.*, 45 F. (2d) 687 (C. C. A. 2nd 1930); *Ford, Bacon & Davis* v. *Volker*

The decisions cited by appellant do not support the conclusion that this case presents a justiciable cause or controversy. Three cases upon which appellant particularly relies are *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, and *United States* v. *Public Utilities Commission*, 151 F. (2d) 609 (App. D. C. 1945). In not one of these cases was the question of the existence of a justiciable cause or controversy raised, briefed or argued. For that reason these cases cannot be regarded as authoritative on the jurisdictional issue, it being the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the issue was ignored. *Ayrshire Corp.* v. *United States*, 330 U.S. 132, 137, fn. 2.[33]

The appellant also cites a number of other cases involving the validity of Commission orders in which the Attorney General has refused to join in the appeal, has taken a

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tice, 64 F. (2d) 800, 801 (C. C. A. 5th 1933); *Hill* v. *Wilson*, 210 Fed. 200 (C. C. A. 5th 1914); see Levi and Moore, *"Federal Intervention: The Procedure, Statutes and Federal Jurisdictional Requirement,"* 47 Yale L. J. 898, 910, *et seq.* and Moore, *Federal Practice*, II, 2378.

[33] Both *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, and *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, involved separate actions that were consolidated. In each case one of the actions was brought by a private person and admittedly presented a justiciable cause or controversy. In the *Inland Waterways* case several elevator companies brought an action to annul the Commission's order and this action was consolidated with the separate action brought by the Inland Waterways Corporation (see record in *United States* v. *Inland Waterways Corp.*, No. 175, October Term, 1942). In the *Mechling* case, the Mechling Barge Line Company brought an action to annul the Commission's order. This action was consolidated with separate actions brought by the Inland Waterways Corporation and the Secretary of Agriculture (Record in *United States* v. *Mechling*, No. 72, October Term, 19[illegible]).

neutral position or has attacked the validity of the Commission's order. (See Appellant's Brief, p. 35). In these other cases, however, the action was instituted by private persons whose legal interests were adversely affected by the order of the Interstate Commerce Commission and whose standing to sue could not be questioned under the Urgent Deficiencies Act. In cases of this kind a justiciable controversy existed between the private persons who instituted the litigation, on the one hand, and the United States, on the other. The fact that the Attorney General declined to defend the Commission's order in these cases is not relevant to the question of the existence of a justiciable cause or controversy. If a justiciable controversy exists, different agencies of the Government may appear in that controversy and express conflicting views on the issues involved. But in such a situation the justiciable controversy is not created by the conflicting views of the Government agencies; it has an independent origin.[34]

[34] *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, is a good illustration of a case of this kind. There the Commission authorized a fare increase by the Hudson & Manhattan Railroad. Suit was brought by Jersey City against the United States to set aside and enjoin the order. The Economic Stabilization Director intervened under the authority of Section 1 of the Stabilization Act (50 U. S. C. App. 961) and joined in the attack on the order on the ground that the Commission had failed to give proper consideration to the inflationary aspect of the order. The Commission and the carriers filed answers. The United States filed a "neutral answer" because two federal agencies were in opposition. No question of the existence of a justiciable controversy arose. There a controversy in the constitutional sense existed between Jersey City, on the one hand, and the United States as defendant, on the other; the fact that the Economic Stabilization Director intervened in the controversy on behalf of Jersey City did not destroy the court's jurisdiction. This case also illustrates the principle that the question whether a case or controversy exists must be determined by the identity of the original parties to the litigation, and not by reference to the identity of intervening par-

III. The Appellant Having Elected to Seek Reparation from the Interstate Commerce Commission in the First Instance is Now Barred by Section 9 of the Interstate Commerce Act from Obtaining Judicial Review of the Commission's Order Denying the Relief Sought.

The complaint that the appellant filed with the Interstate Commerce Commission not only asked the Commission to make an administrative determination with respect to the legality of the practices of the railroads at Norfolk, but also asked the Commission to award the War Department reparation for damages said to have been suffered by reason of the alleged unlawful conduct of the railroads. The Commission denied appellant's prayer for reparation and it is that determination that appellant now seeks to have reviewed by the courts.[35]

A litigant who submits a claim for reparation to the Interstate Commerce Commission in the first instance cannot obtain judicial review of the Commission's order denying the relief sought. This conclusion is required by the language of Section 9 of the Interstate Commerce Act. That section provides that a person who claims to have been injured by reason of a violation of the Act may seek damages either before the Commission or in a suit in a United States district court, but that the person "shall not have the right to pursue both of said remedies and must in each

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ties. *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 22; *Interstate Commerce Commission* v. *Columbus & Greenville Ry.*, 319 U. S. 551; *North Carolina* v. *United States*, 325 U. S. 507; *Alabama* v. *United States*, 325 U. S. 535; *McLean Trucking Co.* v. *United States*, 321 U. S. 67, and *American Trucking Assns.* v. *United States*, 326 U. S. 77, were all cases of this kind.

[35] When the Commission's order was entered, the purpose of the proceeding before the Commission was for reparation only and the Commission so found. (R. 108)

case elect which of the two methods of procedure herein provided for he will adopt.

For many years this Court has consistently held that a person who chooses to resort to the Commission to recover damages in the first instance has made his election under Section 9 and is not entitled to judicial review of an order of the Commission that denies his prayer for relief. *Standard Oil Co. v. United States*, 283 U. S. 235; *Brady v. Interstate Commerce Commission*, 43 F. (2d) 847 (N.D. W.Va. 1930), aff. *per curiam* 283 U.S. 804; *George Allison & Co. v. United States*, 12 F. Supp. 862 (S.D. N.Y. 1935), aff. *per curiam* 296 U.S. 546; *Cramer v. United States*, 23 F. Supp. 690 (E.D. Mo. 1938), aff. 305 U.S. 567; *Atlantic Lumber Corporation v. Southern Pac. Co.*, 47 F. Supp. 511 (D. Ore. 1942); *Ashland Coal & Ice Co. v. United States*, 61 F. Supp. 708 (E.D. Va. 1945), aff. *per curiam* 325 U.S. 840. And see *Terminal Warehouse v. Penn. R. Co.*, 297 U.S. 500, 507-508.

In certain of these cases the negative order doctrine (first established in *Procter & Gamble v. United States*, 225 U.S. 282) was an alternative ground of decision. See for example *Standard Oil Co. v. United States*, 283 U.S. 235, 238. But the courts' interpretation and application of Section 9 of the Interstate Commerce Act did not depend upon the negative order doctrine, but rested rather upon the plain import of the words of the section. The decision of this Court in *Rochester Telephone Corp. v. United States*, 307 U.S. 125, discarding the negative order doctrine as the test of jurisdiction to review orders of the Interstate Commerce Commission, did not destroy the authority of the earlier decisions in so far as those decisions interpreted and applied Section 9. In its opinion in the *Rochester Telephone Corp.* case this Court recognized that the decision in the *Standard Oil* case did not depend primarily upon the negative order doctrine, and indicated that the review and rejection of the negative order doctrine was

not intended to impair the interpretation and application of Section 9 made in the *Standard Oil* case.[36]

Six years after its decision in the *Rochester Telephone Corp.* case, this Court affirmed *per curiam*, on the authority of the *Standard Oil* case, a decision by a three-judge court, convened under the Urgent Deficiencies Act, holding that a litigant who sought damages in the first instance before the Commission could not obtain judicial review of an order denying his prayer for relief.[37] *Ashland Coal & Ice Co.* v. *United States*, 325 U.S. 840.

Appellant attempts to overcome this substantial and long established body of authority by an argument that proceeds along two lines. In the first place appellant argues that "Section 9 refers to alternative jurisdictions (*sic*) of cases seeking an award of damages, and not to suits instituted under the Urgent Deficieneies Act seeking review of the Commission's action on claims presented to it under § 13 of the Interstate Commerce Act (49 U.S.C. § 13)." (Appellant's Brief, p. 49). No decision of this Court lends any support to this construction of Section 9. On the contrary, the decisions cited at p. 55, *supra*, were all cases in which the courts interpreted the election of remedies provision of Section 9 as applying to a suit brought under the Urgent Deficiencies Act to review an order of the Commission. The words of Section 9 refer to "any District Court or Circuit Court of the United

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[36] In *Rochester Telephone Corp.* v. *United States*, the Court, commenting on the *Standard Oil* case, said (307 U. S. 125, 140, fn. 23):

> "*Standard Oil Co.* v. *United States*, 283 U. S. 235, held not reviewable the action of the Commission refusing to grant reparations, but the main basis of the decision was not the 'negative order' doctrine but the statutory scheme dealing with reparations."

[37] The affirmance by this Court of the decision of the district court in the *Ashland Coal & Ice Co.* case is flatly inconsistent with the contentions made by appellant. Appellant's recourse is to suggest that the *Ashland Coal & Ice Co.* case was overruled *sub silentio* by this Court in *El Dorado Oil Works* v. *United States*, 328 U. S. 12. For a discussion of this point see pp. 62-64, *infra*.

States of competent jurisdiction" without drawing any distinction between an ordinary district court and a district court convened under the Urgent Deficiencies Act, or between "original jurisdiction" and jurisdiction to review orders of the Commission. If Congress had intended to write into Section 9 the distinction now suggested by appellant it would have done so by the use of apt and explicit language.

In the second place appellant argues that if Section 9 is to be construed as denying review under the Urgent Deficiencies Act in any circumstances, the Section can only apply in those cases in which the litigant is not required to resort in the first instance to the Interstate Commerce Commission by the primary jurisdiction doctrine, developed and applied in such cases as *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 and *Armour & Co.* v. *Alton R. Co.*, 312 U.S. 195. (Appellant's Brief, p. 53). As applied to the instant case appellant's argument is that the election of remedies provision of Section 9 does not apply because under the primary jurisdiction doctrine the appellant had no choice but to submit its claim for reparation to the Interstate Commerce Commission and hence had no real opportunity to elect its remedy.[38]

[38] The same argument was pressed upon this Court by the appellant in *Ashland Coal & Ice Co.* v. *United States*, 325 U. S. 840. There the appellant had asked the Commission for reparation for rates charged in the past that were alleged to have been unreasonable. The Commission denied reparation. Since reparation was sought on the ground that the rates had been unreasonable an administrative question was raised which under the primary jurisdiction doctrine had to be submitted in the first instance to the Commission. In its brief submitted in this Court the appellant argued that Section 9 did not apply and that the *Standard Oil* decision was not controlling because appellant had no real election of remedies, but was required to proceed initially before the Commission (See Brief for the Appellant in *Ashland Coal & Ice Co.* v. *United States*, No. 1287, October Term 1944, pp. 4-8). This Court rejected that contention and affirmed the decision of the court below on the authority of the *Standard Oil* case (325 U. S. 840).

This argument is based on a misconception of the nature of the rule of primary jurisdiction. That rule does not require a complainant to submit a claim for damages to the Interstate Commerce Commission in the first instance. The rule is that if the claim for damages requires the decision of a question which Congress has committed to the administrative judgment of the Commission, then there must be preliminary resort to the Commission for the decision of *that administrative question*. The point that appellant overlooks is that it is the administrative question and not the claim for damages that must be submitted in the first instance to the Commission. The decisions of this Court that developed and applied the primary jurisdiction doctrine were not intended to repeal or to amend Section 9 by deleting the provision for election of remedies. On the contrary, in its opinions discussing the primary jurisdiction doctrine, this Court has frequently recognized that the election given to the litigant by Section 9 has not been destroyed and that a litigant is always free to withhold his claim for damages and to submit that claim to the Federal courts on the basis of the Commission's determination of the administrative question. *Mitchell Coal Co.* v. *Penna. R. Co.*, 230 U.S. 247, 257; *Penna. R.R.* v. *Puritan Coal Co.*, 237 U.S. 121, 131; *Terminal Warehouse* v. *Penn. R. Co.*, 297 U.S. 500, 507-508. See also *Geo. A. Hormel & Co.* v. *C. M. St. P. & P. Ry. Co.*, 283 Fed. 915 (C.C.A. 8th 1922); *Hillsdale Coal & Coke Co.* v. *Penna. R. R. Co.*, 237 Fed. 272 (E.D.Pa. 1916); *Minds* v. *Penna. R. Co.*, 237 Fed. 267 (E.D. Pa. 1916) aff. 244 Fed. 53 (C.C.A. 3rd); *Powrys* v. *Cady*, 9 F. (2d) 458 (W.D. La. 1925).[39]

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[39] The following passage from the opinin in *Minds* v. *Pennsylvania R. Co.*, 237 Fed. 267 (E. D. Pa. 1916) contains a well considered statement of the rule (269-270).

> "The administrative questions must be first determined by the Commission, because, if an action were brought at law, without this first finding, the plaintiff could not make out his case. His real option is this: He may submit the administra-

That the primary jurisdiction doctrine does not compel a litigant to submit his prayer for reparation to the Interstate Commerce Commission, but only requires him to obtain a determination by the Interstate Commerce Commission of the administrative questions raised by his claim before he resorts to the courts, is indicated by a passage

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tive question alone to the Commission, and thus, having established his right to recover his damages, may bring his action at law, and prove both his injury and the amount of his damages, or he may exercise the right given him by the statute by submitting both questions to the Commission. If he takes the first course, the action is one for damages and subject to well-known rules. If he takes the second course (as these plaintiffs did) what results? Had the right of trial by jury not been involved, Congress would doubtless have given the award of the Commission the effect of a judgment. The complainant, being a volunteer, is concluded by what the Commission does. The defendant is not concluded. If the defendant complies with the order, the plaintiff is done. If the order is not complied with, the plaintiff may have recourse to the courts (federal or state), [illegible] forth his injury, the fact of his complaint to the Commission, and the order made thereon, and that it has not been complied with. In the words of the statute, the cause then proceeds as an action for damages, except that the findings of the Commission are made evidence, and the defendant must pay costs and counsel fees."

Compare the statement in *Stamps* v. *Chicago, R. I. & P. Ry. Co.*, 253 I.C.C. 557, 559 (1942):

"Where, as here, an issue as to the past is presented involving questions essentially of fact and of our administrative discretion, it is well settled that a finding must be here sought before the jurisdiction of the Federal court may be invoked. Under section 9 of the act, complainant may elect either to (1) seek a finding here, and, when we have declared the practice to have been unlawful, seek damages in the courts, or (2) seek a finding and reparation order here, and, if the order is not obeyed, sue on it in the courts."

in the opinion in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, the decision in which the primary jurisdiction doctrine was first announced and applied. The significant point about this passage is that it speaks in terms of a limitation of the right of a person "originally" to maintain actions in the courts and in terms of a limitation of the power of the courts "primarily" to hear complaints that require the decision of questions committed to the administrative judgment of the Commission. The passage follows (204 U.S. at p. 442):

> "In other words, we think that it inevitably follows from the context of the act that the independent right of an individual *originally* to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission and, therefore, does not imply power in a court to *primarily* hear complaints concerning wrongs of the character of the one here complained of." (Italics supplied)

It is difficult to reconcile appellant's insistence that it was required by the primary jurisdiction doctrine to submit its claim for damages to the Commission with some of the arguments advanced by appellant in its attack on the merits of the Commission's order. For example, the appellant asserts that it was an error of law for the Commission to conclude that the railroads were under no legal duty to provide piers and handling services on export traffic. (Appellant's Brief, p. 66, *et seq.*). To the extent that appellant relies upon a purely legal argument of this character its claim for damages would seem to raise a question that does not fall within the scope of the primary jurisdiction doctrine. Another argument made by appellant in attacking the Commission's order is that the Commission's interpretation of the railroads' tariffs was erroneous as a matter of law. Indeed, appellant asserts in this connection

that the interpretation of the tariffs "involved no determination of fact," and that "only a question of law was presented." (Appellant's Brief, p. 73). A decision as to the meaning of the words used in a tariff which raises only a question of law is a question which the courts are competent to decide and which need not be submitted in the first instance to the Commission. See *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U.S. 285, 291-292.

But even if it is assumed that appellant's claim for damages raised questions that had to be determined in the first instance by the Commission, the appellant was still free to pursue the claim for damages before the courts and not before the Commission. Thus, the appellant might have submitted to the Commission solely those administrative questions which fall within the primary jurisdiction of the Commission (for example, the question whether the practices of the carriers were unreasonable and discriminatory) withholding for decision by the courts the War Department's claim for damages. If appellant had pursued this course, it would have preserved its right to pursue its claim for damages in the courts in the event that the Commission's determination was adverse to the carriers.

The decisions indicate that if because of the possibility that the statute of limitations might run, or for any other reason, it would have been a hardship, or otherwise inappropriate, to require appellant to resort in the first instance to the Commission another course of action would have been open to appellant.[49] In such circumstances appellant could have instituted its action in the district court and then asked to have that action stayed pending a determination of the administrative question by the Interstate Commerce Commission. *Southern Railway Co.* v. *Tift*, 206 U.S. 428, 434; *Mitchell Coal Co.* v. *Penna. R. Co.*, 230 U.S. 247, 266-267; *Tank Car Corp.* v. *Terminal Co.*, 308 U.S. 422. The appellant contends that *Armour & Co.* v. *Alton*

[49] Appellant does not suggest that any such conditions of hardship existed in this case.

R. Co., 312 U.S. 195, shows that appellant could not have pursued this course of action. The question was not considered by this Court in the *Armour* case and there is nothing in the opinion in that case to suggest that this Court intended to overrule the decisions that have been cited above or to hold that a plaintiff would not be permitted, if he showed hardship or other appropriate circumstances, to institute the action first in the district court and to have the action suspended pending a determination of the administrative questions by the Commission.[41]

To support its argument that the order of the Commission in the instant case is reviewable, appellant relies upon the decision of this Court in *El Dorado Oil Works* v. *United States*, 328 U.S. 12. That case did not raise any question as to the meaning or application of Section 9 of the Interstate Commerce Act. In that case, an ordinary suit in contract had been brought in a Federal district court to recover amounts alleged to be due under a lease of tank cars. The defendant in the litigation had refused to pay the amount in controversy on the ground that if it did so it would be paying rebates in violation of the provisions of the Interstate Commerce Act. This Court held that the question whether the payments called for by the contract violated the Interstate Commerce Act was an administrative question that was primarily subject to the authority of the Interstate Commerce Commission and that the proceeding in the district court should be stayed pending a decision of that question by the Commission. *Tank Car Corp.* v. *Terminal Co.*, 308 U.S. 422.

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[41] In *Armour & Co.* v. *Alton R. Co.*, 312 U.S. 195, the Circuit Court of Appeals rejected a request by the plaintiff that the action in the district court be suspended pending a determination by the Commission. It did so on the ground that the plaintiff had failed to show hardship or other reason for dealing with the case in that way. 111 F. (2d) 913 (C.C.A. 7th 1940). The plaintiff did not seek review of that part of the decision of the Circuit Court in its petition for a writ of certiorari.

The plaintiff in the litigation thereupon instituted a proceeding before the Interstate Commerce Commission to obtain a determination of the legality of the payments called for by the contract. In the proceeding before the Commission the plaintiff did not seek reparation. In that proceeding the Interstate Commerce Commission decided that the payment of the amounts sought by the plaintiff in the litigation in the district court would be unjust, unreasonable and unlawful under the Interstate Commerce Act. On the basis of this determination, the Commission ordered the proceeding before it to be discontinued. This Court held that the Commission's determination was reviewable under the Urgent Deficiencies Act.

In the *El Dorado* case, the plaintiff in the litigation was attempting to enforce a right that arose under a contract and not under the provisions of the Interstate Commerce Act. No question arose or could arise in that case about the meaning or application of Section 9, and no suggestion could properly be made that the plaintiff was required to make the election of remedies provided for by Section 9.[12] The decision cannot be regarded as holding that a person who seeks damages in the first instance before the Interstate Commerce Commission can bring a suit under the

[12] In its opinion the Court did not cite or discuss *Standard Oil Co.* v. *United States* or any of the other cases relating to the election of remedies provided for by Section 9.

In the *El Dorado* case the Attorney General filed in this Court a memorandum on behalf of the United States and the Interstate Commerce Commission drawing an analogy between the function exercised by the Commission in the *El Dorado* case and the function exercised by the Commission in reparation cases under Section 9. (Appellant's Brief, p. 40). The memorandum did not refer to or discuss the question of election of remedies under Section 9; that question was not raised in the *El Dorado* case. In its opinion the Supreme Court did not discuss the remote analogy suggested by the Attorney General. The submission of the memorandum is hardly an adequate basis for suggesting that in the *El Dorado* case this Court intended to consider the interpretation or application of Section 9.

Urgent Deficiencies Act to obtain judicial review of the order of the Commission denying his prayer for damages.[43] The decision does suggest that a person who does not seek damages before the Interstate Commerce Commission but who submits to the Commission only an administrative question, with a view to obtaining a determination that can be used in litigation in a district court may, if the Commission's decision is adverse to his claim, obtain review under the Urgent Deficiencies Act; otherwise the decision has no relevance to the issues in the case at bar.

The issue raised by appellant's attack on the accepted construction of Section 9 of the Interstate Commerce Act is purely an issue of statutory construction. Appellant does not attack Section 9 on constitutional grounds; attack on that ground would be inadmissible because Congress may, without violation of the Constitution, give finality to a determination of the Interstate Commerce Commission denying reparation. See *Butte, Anaconda & Pac. Ry. Co.* v. *United States*, 290 U.S. 127; *Switchmen's Union* v. *Board*, 320 U.S. 297. The construction of Section 9 which appellant attacks has been followed by the Interstate Commerce Commission,[44] by the Attorney General[45] and by the

[43] The argument that this Court in the *El Dorado* case overruled, *sub silentio*, *Standard Oil Co.* v. *United States*, 283 U.S. 235, and *Ashland Coal & Ice Co.* v. *United States*, 325 U.S. 840, was rejected by a district court specially constituted under the Urgent Deficiencies Act, in *Great Lakes Steel Corporation* v. *United States*, 81 F. Supp. 450 (E.D. Mich. 1948).

[44] See *Stamps* v. *Chicago, R. I. & P. Ry. Co.*, 253 I. C. C. 557 (1942).

[45] In the cases cited on p. 55, *supra*, the Attorney General, acting on behalf of the United States as statutory defendant, consistently took the position that Section 9 of the Interstate Commerce Act bars review of an order denying reparation. The Attorney General took this position in *Ashland Coal & Ice Co.* v. *United States*, 61 F. Supp. 708 (E. D. Va. 1945), aff. *per curiam* 325 U. S. 840, after the decision in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. In *Great Lakes Steel Corporation*

courts[46] for many years. In this period of time Congress has on several occasions amended and revised the Interstate Commerce Act, but it has never seen fit to make substantial changes in the provisions of Section 9. In these circumstances if appellant believes that a construction of Section 9 which follows the plain and obvious import of the Section's words brings anomalous results, appellant's proper recourse is to Congress. Compare *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 449.

IV. The Commission's Conclusions Are Based Upon Adequate Findings, Supported by Substantial Evidence, and Are Not Contrary to Law; Therefore They May Not Be Set Aside by the Court.

A. The Scope of Judicial Review.

It is well settled that an order of the Commission is subject only to limited review in the courts and that the case is not to be heard and decided on its merits *de novo*. If the Court determines (1) that the Commission made findings sufficient to indicate the basis for its conclusions, (2) that such findings have some substantial support in the record, and (3) that the Commission has not misapplied law, the power of review is exhausted. The Court "will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling." *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U.S. 541, 547.

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v. *United States*, 81 F. Supp. 450 (E. D. Mich. 1948), the Attorney General took this position in the district court subsequent to the decision of this Court in *El Dorado Oil Works* v. *United States*, 328 U. S. 12 (See pp. 7-22 of the brief filed for the United States and the Interstate Commerce Commission in *Great Lakes Steel Corporation* v. *United States, et al.*, in the District Court for the Eastern District of Michigan, Southern Division, Civil Action No. 6295).

[46] See cases cited on p. 55, *supra*.

The principle was stated in *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 139-140, as follows:

> "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

The findings necessary in a Commission report of the type now under review need not be set out with formality, nor expressed in terms which courts generally employ, but may be "interwoven with other matter." *Meeker & Co. v. Lehigh Valley R. R.*, 236 U.S. 412, 428; *United States v. B. & O. R. Co.*, 293 U.S. 454, 465. The Commission has interwoven its findings with a discussion of the evidence in its reports in this proceeding but its findings and conclusions are nonetheless definite and dispositive of all points in issue, and the United States has raised no question with respect to the form or meaning of the findings.

In its brief the United States recognizes that the scope of judicial review is narrow, stating the rule as follows, at page 48:

> "It has long been well established that in cases brought under the Urgent Deficiencies Act, the power of the District Courts is limited to determination of whether there has been violation of the Constitution, failure to conform to statutory authority, or the arbitrary exercise of power."

As errors of law the Government designates two findings of the Commission, to wit, the conclusion that the railroads have no obligation to provide piers for the interchange of rail freight with vessel, and the conclusion that published tariffs did not have the effect of including terminal services in the line haul rates. With respect to other findings of the Commission the contention is that they lack a "rational basis". There is no argument that the findings of this lat-

ter class are not supported by evidence, but the Court is asked to weigh the evidence, to examine the reasoning processes of the Commission (with special emphasis on the reasoning of dissenting Commissioners) and to exercise an independent judgment in reaching contrary conclusions. This method of attack is not within the scope of review of administrative orders as it seeks to substitute the judgment of the Court for that of the Commission. As stated by Chief Justice Stone in *Medo Corp.* v. *Labor Board*, 321 U.S. 678, 681, fn. 1:

> "It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised and that upon such questions of law, the experienced judgment of the Board is entitled to great weight."

B. The Legal Issues Involved in the Complaint to the Commission.

At the outset it is important to keep in mind that the Commission acts under specific provisions of the law that it administers. It cannot award reparation under general principles of law or broad rules of equity but must deal with the more precise issues of tariff interpretation, reasonableness of rates, or discrimination under definite provisions of the Act. Before both the Commission and the district court, the United States argued its claim for reparation largely on the theory of equitable considerations, such as "unjust enrichment", *e.g.*, that if the Army had not taken over the Norfolk piers for handling its own freight, the railroads would have continued to operate the piers as in the past, at a cost of four cents per hundred pounds of freight; therefore, since the railroads were relieved of this cost, they should not be permitted to "re-

tain the four cents, but should reimburse the Army exactly as they otherwise would have compensated their agent. While the Commission dealt with this argument and specifically found that the four-cent cost was not included in the charges levied on Army freight, and thus the saving to the railroads was not milked from the Army, it disposed of the complaint, as required by statute to do, under the specific sections of the Act alleged to have been violated.

The complaint alleged the violation of Sections 1(5)(a), 1(6), 2, 6(8) and 15(13) of the Interstate Commerce Act, the essential issues being raised under Sections 1 and 2 which together require just, reasonable and non-discriminatory rates and practices. No effort was made by the Government to prove that the rates themselves were unreasonable under Section 1, or that rates reduced by four cents per hundred pounds would still be reasonable. The absence of any such evidence was noted in the reports of the Commission. (R. 97, 108) In fact, this issue was characterized as "immaterial" by Government counsel. (R. 559) On the other hand, much of the Government's argument before the Commission suggested a question of tariff interpretation, an issue arising under Section 6(7) of the Act, although this paragraph was not pleaded in the complaint, and the Government's tariff expert made no such contention at the hearing. (R. 212) All of the negotiations prior to litigation were based on a demand for the publication of new tariff provisions, not that existing tariffs required the payment of allowances. (R. 365, 369, 370, 372) Nevertheless, the initial report of Division 2, and subsequently the dissenting opinions of the same Commissioners, dealt particularly with a violation of Section 6(7), and the Government devotes a chapter of its brief to this question, despite the apparent disclaimer at page 73:

> "The Government's contention was that the railroads had violated the Interstate Commerce Act when they failed and refused to make adequate provision in their tariffs for such an allowance."

The remaining issues raised by the complaint, namely, the alleged violation of Sections 6(8) and 15(13) of the Act add nothing of substance in support of the claim for reparation. Section 6(8) merely requires the railroads in time of war to facilitate and expedite military traffic. It provides no basis for the payment of reparation because of rates charged, and no such order has ever been made under that section. It was pleaded only to bolster a contention that the railroads should have paid the Government certain refunds in time of war which would not have been made to any shipper in time of peace, that is to say, that the Army should have been treated more liberally from a revenue standpoint.

Section 15(13) requires the publication in tariffs of allowances to shippers and authorizes the Commission to determine the reasonable limits of such payments. Its purpose is to permit the payment of allowances to shippers for performing a part of the railroads' transportation obligation and to prevent the payment of unauthorized or exorbitant allowances, *i.e.*, rebates, but it gives no shipper the right to volunteer to take over a part of the transportation obligation for his own convenience and thus exact a refund from the railroads. *Atchison Railway Co.* v. *United States*, 232 U.S. 199. Section 15(13) provides no basis for an award of damages unless service performed by a shipper is part of the railroad obligation, and unless the shipper, in addition to performing the service, also pays the railroad for performing it. Since the contention was, as quoted above, that the railroads had failed to make provision in their tariffs for such payment, not that they had committed themselves to paying allowances, damages could be awarded only on a showing that the Army had paid excessive charges. Thus, disposition of the issue arising under Section 15(13) was dependent on findings that the charges were unreasonable or discriminatory under Sections 1 or 2.

freight. The railroads denied the request on the ground that it was not the practice to pay allowances to shippers for supplying their own services of this character, and that the railroad obligation was limited to actual performance by themselves of the services on railroad or public terminals. Ultimately, the Government filed its complaint with the Commission alleging that it was an unreasonable and discriminatory practice for the railroads to refuse to make an allowance to the Army and that, as a result, the line-haul freight rates were unreasonable and discriminatory.

In substance, and stripped of legal terminology, the case presented to the Commission was that when the Army took over the piers for its own purposes it was entitled to payments of (1) the same wharfage or rental costs as incurred by the railroads when the facility was a railroad terminal, *i.e.*, one cent per hundred pounds of freight, and (2) the same unloading cost incurred by the railroads when their agent unloaded freight in railroad custody, *i.e.*, three cents per hundred pounds. In short, the contention was that the railroads had an obligation to provide the Army with piers for its exclusive use (being the same piers from which the railroad agent had been ejected) and to hire the Army to unload its own freight. Cloaked in various disguises, the arguments of counsel have a different sound, but this is the essence of the case and the Commission so found.

2. Background of the Port Practices.

Ordinarily, the railroads do not unload carload freight as this is the obligation of the shipper. See *Barringer & Co. v. United States*, 319 U. S. 1, 3. Nevertheless, under special circumstances, they may do so, as illustrated in the *Barringer* case and other cases therein cited, either with or without any change in the applicable freight rates. The extra service may be accorded to some shippers or certain types of freight and not to others, although the same rates

are charged, and the resulting disparity is not *ipso facto* unlawful. Disparity of this kind must be judged under the specific mandates of the Interstate Commerce Act, especially Sections 1, 2 and 3, and the question is usually presented under Section 3 (the undue prejudice and preference proviso) which was not pleaded in this case because it requires proof of competition with other shippers.

One of the exceptions to the established custom is the free unloading of export freight by the railroads on public piers, *i.e.*, piers operated by railroads, steamship companies or public wharfingers. The practice varies slightly at the different ports. For example, at Baltimore the privilege is accorded only on railroad piers; at Wilmington, Delaware, only on a municipal pier, whereas at Philadelphia the several types are used, railroad, steamship and other public piers. (R. 289) The fact that the privilege is so limited has never been held to violate the law because the railroads have the right to select their own agencies and facilities, provided they are open to equal use by all shippers alike. (R. 93)

The unloading privilege is not extended in any event to private piers, by which is meant piers owned or operated by shippers for handling their own freight. Such piers are characterized as "private" because they are not open to all shippers on equal terms; they lack the attributes of public utilities. (R. 304-306) There are many such piers along the Atlantic seaboard and freight passing over them is not unloaded by the railroads, although it moves on the export rates provided there is direct transfer from car to ship, *i.e.*, that the shipper does not take custody of the freight and thus interfere with the continuity of movement. (R. 455) These are significant points in this proceeding because, as will be shown, the Army not only operated its own pier at Norfolk but it took custody of the freight. In similar circumstances, other shippers would not receive either the unloading service or the export rates, but the latter were accorded to the Army, contrary to the usual

the concentration over a limited number of piers, and the conservation of revenue. For example, freight coming into the possession of the owner is regarded as domesticated and is not entitled to the privileges accorded water-borne freight. Ordinarily carriers cannot handle freight over private piers at their convenience and economical handling cannot be achieved if freight is widely dispersed over many piers. Defendants are fearful that if they are required to perform the transfer services at the piers of Atlantic Terminals, Incorporated, such action will result in extension of the practice beyond reasonable bounds. They show that there are numerous companies at Port Newark and other ports with private facilities along the water front which, by the formation of a pier company or public terminal, would be in a position to demand the performance of the transfer services. At the time of the hearing, a new terminal company had been formed to operate on the property of a large shipper at Port Newark and had sought an extension of railroad services to its piers."

In that proceeding the Commission found that the railroad's refusal to handle freight between the cars and ships at Newark, N. J., on the shipper's own pier while it performed the service on public piers on traffic moving on the same rates was not unreasonable or discriminatory. Commenting on that finding in the report now under review, the Commission said: "The facts there are similar to those here". (R. 95)

In *City of Newark* v. *Pennsylvania R. Co.*, 182 I. C. C. 51 (1932), the Commission, although requiring the removal of undue prejudice in loading practices under Section 3, limited its order to railroad piers on the finding that it was not the practice at other ports to perform the service or pay allowances on piers controlled by shippers. Subsequently, the issue arose again in *Newark, N. J., Cham. of Com.* v. *Pennsylvania R. Co.*, 206 I. C. C. 555 (1935), and the Commission held that the issue could not be sustained with respect to private piers. In *M'Cormick Warehouse*

Court in *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan American Corp.*, 304 U. S. 156; *United States* v. *Wabash R. Co.*, 321 U. S. 403.

Furthermore, the findings of the Commission on this point are final, as the court stated in the cases cited. See the *Wabash* case, at page 408, where the Court said:

> "In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."

See also *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368, 378.

There is no room for the attempt of the United States to explain away this finding of the Commission on the ground that it applies only to land deliveries and not to deliveries on piers. The same principle applies. At some point the railroads' obligation ends and whether the shipment is consigned for delivery to an industry, a public terminal or a steamship pier, the party entitled to receive the shipment may terminate the railroads' obligation by interposing to take possession. The courts have not only applied the same principle but, indeed, the same specific "pronouncement" to pier deliveries. *Interstate Commerce Commission* v. *Hoboken R. Co.*, *supra*; *Parka Corporation of Baltimore* v. *Pennsylvania R. Co.*, 130 F. (2d) 804 (C. C. A. 4th 1942).

The Government's theory (Brief, p. 66) that railroads were under an obligation to provide the facilities and services necessary for the delivery of export traffic to connecting lines, *i.e.*, vessels, is beside the point. American railroads do not publish through rates with steamship companies to foreign ports and the Commission's authority under Part III of the Act does not extend to such commerce. Rail shipments are not consigned to foreign destinations like shipments to an off-line railroad station, and the railroads do not contract to deliver beyond the local port. Fur-

thermore, the vessels transporting the Army freight were not common carriers but were owned or chartered by the Government (R. 536), and thus were not connecting carriers in the usual sense. Nevertheless, assuming the contrary were true and that the railroads had a duty to deliver to vessels, it still does not follow that the railroads had any obligation to unload the cars. The cases cited by appellant say nothing about any such duty. Nor do they suggest that a railroad has any obligation to provide piers, a point that will be developed further in the next topic.

The Commission found that the Army traffic was "not export in the usual sense" (R. 91) and would not have been entitled to export rates except for a concession made by the railroads.[54] (R. 103) It found also that even with respect to usual export freight, the railroads have no obligation to provide the facilities and services for interchange with vessels, except to the limited extent provided in their tariffs. (R. 102)

4. The Obligation to Provide Piers.

The Commission found that there was "no showing that the defendants have failed to provide reasonable pier facilities, even assuming that they were legally bound to do so, which they deny, and rightfully so", (R. 93) and that it was not "the legal duty of the railroads to provide piers, which are essentially steamship facilities." (R. 102)

The lack of any obligation on the part of the railroads to perform a service, or to pay allowances in lieu thereof, is brought to a sharper focus in this case when consideration is directed to the wharfage problem as distinguished from unloading. After the Army had taken over the termi-

[54] It is not disputed in this proceeding that export rates would not have been applicable to freight consigned to the Army Base except for a special tariff provision. Nevertheless, it may be noted that the Commission ruled formally on this question in 1915, *United States* v. *Pennsylvania R. Co.*, 32 I. C. C. 730 (1915). The opinion is not printed in full but the Commission's decision was based on the Government's intervening custody of freight passing over a Navy pier.

C. THE COMMISSION'S CONCLUSION THAT THE FAILURE OF THE RAILROADS TO PAY THE ARMY AN ALLOWANCE FOR UNLOADING AND WHARFAGE SERVICES WAS NOT AN UNREASONABLE OR DISCRIMINATORY PRACTICE IS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND IS NOT VITIATED BY ERROR OF LAW.

1. Summary of the Case Presented.

At Norfolk there are numerous private piers, railroad piers and other piers operated by public wharfingers. The largest facility (consisting of piers, warehouses and railroad tracks) is the so-called Army Base which, for many years prior to the war, was leased to and operated by a public wharfinger as a seaboard terminal. The Transport Trading and Terminal Corporation was the last of a succession of such terminal operators.

In order to make full use of this facility for railroad business, the railroads entered into arrangements with the terminal operator to act as their agent in providing railroad facilities and services. The arrangements were not joint but several, although generally similar, and in substance they constituted the terminal a railroad station and the terminal operator an agency of the railroads. (R. 88)

The purpose of the arrangements was to provide additional facilities where railroad freight could be transshipped between rail and vessel, as the export (and import) freight rates published by the railroads are applicable only when shipments do not pass from carrier possession. (R. 288) Otherwise, the continuity of movement is broken and the domestic freight rates, usually higher than export rates, apply. For the use of the facility, the railroads paid the terminal operator compensation measured by the amount of railroad freight passing over the piers, to wit, one cent per hundred pounds. This payment was characterized as "wharfage", which technically means the use of the surface of the pier, as distinguished from "dockage", which means the use of the berth by a ship. Actually the payment

was ordinary rental and, so far as legal requirements go, could have been made in a lump sum yearly amount or in any other way agreeable to the parties. Only they were concerned and the payment could have been more or less, as it was not subject to Commission or other regulation.

Likewise, the railroad paid the terminal operator three cents per hundred pounds for unloading certain freight from cars to pier. This payment was pursuant to an obligation undertaken in railroad tariffs to unload certain export freight on designated piers, including the facility operated by Transport Trading and Terminal Corporation, without expense to the shipper. This payment also was merely compensation to an agent for performing a railroad service and could have been measured in any other way agreeable to the parties, as it was not subject to regulation by law. Although it was sometimes termed an "allowance", it was not such in the usual sense, as referred to in Section 15(13) of the Act, since it was not a refund of part of the freight rate to shippers for performing part of the railroad transportation obligation with respect to their own freight.[47] (R. 305)

On June 15, 1942, the Army dispossessed the terminal operator and took possession of the facility for handling Government war freight, thus automatically terminating the railroad agency. Shortly thereafter, it notified the railroads that it desired to be paid the same compensation, to wit, four cents per hundred pounds, that had theretofore been made to the terminal operator. (R. 365, 370) The demand took the form of a request for the publication of allowances in the tariffs, which would have been the proper procedure had the railroads been obliged to compensate the Army for furnishing its own pier and unloading its own

[47] In *Handling Freight Between Ships and Cars at Ports*, 253 I. C. C. 371 (1942), the Commission noted that this type of payment is not a true allowance which requires tariff publication under 15(13).

rule, by special concession of the railroads." As found by the Commission at 264 I. C. C. 683, 686 (R. 51):

> "By a special tariff provision the defendants' export rates apply on the complainant's shipments, although the traffic is not export in the usual sense, as it passes into the possession of the complainant at points adjacent to the piers."

Again, referring to the same point, the Commission stated in its final report, 269 I. C. C. 141, 143 (R. 103):[49]

> "At the insistence of the complainant, therefore, the defendants included a provision in the tariffs to the effect that the export rates would apply also on shipments consigned to the United States Government and landed through Navy Bases, Navy Yards, or Army Bases for export to foreign countries. By reason of this provision the carriers apply the export rates on traffic moving over the Army Base Piers 1 and 2. There is nothing in the tariffs, however, that requires the defendants to pay the complainant an allowance for wharfage and handling traffic through the Army Base at Norfolk. The provision makes the export rates, but not the absorption arrangement, applicable. As the defendants rightly argue, the granting of one concession does not necessarily require another to the same party."

The reasons for restricting the unloading service to public piers are not difficult to understand. They are con-

[48] At pp. 92-93 of its brief, the United States construes the findings of the Commission as if they referred to the unusual volume and nature of the Government traffic, as distinguishing it from commercial traffic. It is entirely clear that the Commission was discussing the owner's custody of the freight at the port, which ordinarily would destroy its export character.

[49] The first five words of the quotation do not appear in the printed record due to a typographical error in the petition filed by the United States. The error was noted in the answer filed by intervenors in the district court. (R. 125)

sistent with the historical purpose of the practice which was simply to provide an interchange between rail and vessel which the shipper could not perform for himself, both because he was not present at the port and because the railroads could not permit shippers to interfere with the operation of the piers. In time the practice was extended beyond railroad piers to public piers for competitive reasons and to secure additional facilities for handling railroad business. There is no similar necessity for unloading when the shipper has his own pier and controls his own freight, with the advantages resulting therefrom, and the railroads have always declined to operate on such private piers. This has conserved their revenues which is a valid reason for the limitation in the absence of discrimination. Since nothing was added to the rates to compensate for unloading, thus making it, in a sense, a free service, the railroads would not willingly have extended the practice to private piers, and doubtless could have cured discrimination, had it been found to exist, by the establishment of a charge on their own piers as an alternative to providing the service on private piers.[30] The equal treatment provisions of law have required strict adherence to the established rules and practices so as not to create unlawful situations with respect to different shippers, and the Commission has consistently found over the years that the restriction of unloading service to public piers has a reasonable basis and has not resulted in discrimination. The Commission so found in this proceeding: (R. 102)

> "It is neither the legal duty of the railroads to provide piers, which are essentially steamship facilities, nor to load or unload carload freight except in unusual circumstances, such as livestock, or freight that is to be transshipped by the railroads or their agents. When

[30] Plus charges were published as a result of the Commission's decision in the *City of Newark* case, 182 I. C. C. 51 (1932), as explained in the *Weyerhaeuser* case, pp. 76-77, 469, both *infra*.

they obligate themselves to load or unload carload freight, the duty is established by tariff undertaking. In assuming that obligation with respect to export and import traffic, the carriers have restricted the practice to so-called public piers, that is, piers operated by railroads, steamship companies, or public wharfingers, and have excluded the so-called private piers, that is, piers operated by the owners of the freight. See *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463.

The reference to the *Weyerhaeuser* case is significant as indicating that the problem had been considered by the Commission before, and it is a fact that similar issues had been presented in numerous cases and that the Commission was fully acquainted with the so-called port practices. In the *Weyerhaeuser* case, decided in 1938, the Commission had said (229 I. C. C. at pp. 472-473):

> "Under the present tariffs the rail carriers undertake to load and unload water-borne freight only at railroad or public piers, but in no event at piers controlled by the owners of the freight. At Baltimore the services are performed only at railroad piers, at Camden, Wilmington, and Trenton only at municipal piers, at Philadelphia at either railroad or municipal piers or at privately owned piers which are operated as public piers, but in no case will the service be performed at piers controlled by the owner of the traffic. At Chester the services are performed at a railroad facility and at the pier of a warehousing company, which is operated as a public facility, but the services are not performed on freight in which the warehousing company or its owner has an interest. . . .
>
> "The policy of defendants has been to restrict the port practices as much as possible, consistent with adequate service. Piers other than railroad piers are used only when necessary to supplement railroad facilities. In no case is the transfer service performed at a pier controlled by the owner of the traffic. The reasons for this policy are the difficulty of policing the practice, the necessity of performing the handling at the rail carriers' own convenience, the economy resulting from

Co. v. Pennsylvania R. Co., 191 I. C. C. 727 (1933) payment to a terminal operator for unloading services was prohibited on the ground that it was acting as the agent of shippers and thus that the custody of the freight would be that of the shipper. In such circumstances the proposed payment was characterized as a rebate, but the Commission pointed out that an arrangement would be lawful whereby the terminal was made an agency of the railroad and operated as a public freight station with railroad custody of the freight. At Norfolk, prior to June 15, 1942, the railroads had such an arrangement, but it was terminated when the Army took over the facility and placed itself in the exact position of the several shippers involved in the above proceedings.

The attitude of the railroads toward the Army's demands at Norfolk was strictly in line with their past practices at that and other Atlantic ports, and the disposition of the complaint by the Commission was consistent with its rulings in a long line of prior cases.[51] Since the earliest days of

[51] In addition to those cited, see other cases discussed at p. 88. The Government relies (Brief, p. 81) on *Elimination of New York, N. H. & H. R. Pier Stations*, 255 I. C. C. 305 (1943), as showing an inconsistency with the findings in the instant case, and thus demonstrating arbitrary action. The Commission gave the *New Haven* case full consideration. (R. 95).

That proceeding arose when the railroad attempted to eliminate certain piers as stations from its tariffs on the ground that Army traffic had become dominant and that the piers were no longer public facilities. The Commission ruled to the contrary, finding that the piers had retained their status as a commercial facility. The refusal to continue the service while at the same time absorbing the cost of unloading commercial traffic on other piers was regarded as prejudicial to commercial traffic. The case did not require either the unloading service or the payment of allowances on Army freight as sought in the instant proceeding.

In the *New Haven* case, the railroad was required to continue its service to commercial shippers on the pier in question but not to employ the Army for that purpose. This it was permitted to

the Commission, no problem has come more frequently to its attention than the export rates, involving the well-known port differentials, and thus the Commission has complete familiarity with the export rate adjustments and the practices attaching thereto.

3. The Army's Demand for Allowances.

The Commission found with respect to the unloading service that "obviously anything but operation by the complainant was impractical" (R. 90) and that "the defendants would not have been able to continue the work done formerly by the Transport Trading and Terminal Corporation at their convenience and to the satisfaction of the complainant". (R. 104) Also, that "defendants could not have performed the service individually but would have been obliged to pool their activities and operate as a unit under the complainant's control", which was beyond their legal obligation. (R. 90) And finally, wholly apart from the foregoing considerations, that the type of delivery demanded and accepted by the Army discharged the transportation obligation and relieved the railroads from any duty to unload the freight that they might otherwise have had. (R. 104-105)

If the railroads had any obligation with respect to Army freight, it was an obligation to perform service, not to pay

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do without Army interference. The Army, however, handled its own freight and as to that the railroad was not required to unload or pay allowances. At Norfolk, the situation is just the reverse. The Army not only took charge of and handled its own freight but also a small quantity of commercial freight that was permitted on the pier. The difference between the two situations is emphasized by the original report of Division 2 which, although finding that allowances should be paid on Army freight at Norfolk, specifically excluded the commercial freight. (R. 79) The United States has taken no exception to that ruling either before the Commission or the court.

allowances, and such an obligation carries with it the correlative right to render the service. *Atchison Railway Co.* v. *United States*, 232 U. S. 199. This principle is now recognized in the brief filed by the United States and, accordingly, it attempts to show that the railroads had an opportunity to render the service, but declined and, therefore, that the Army had no alternative but to demand allowances. This is a distorted picture of the true situation, as the railroads were not expected to render service and would not have been permitted to do so in any practicable manner. In dealing with this phase of the case, no departure is intended from the position already taken that there was no railroad obligation to unload Army freight on an Army pier.

Shortly after June 15, 1942, the Army, then being in control of the Army Base, made demand on the railroads to amend their tariffs to provide for the payment of allowances on Government freight. No claim was advanced that the United States was entitled to payment under existing tariffs, some of which continued to refer to the arrangements with the former terminal operator, Transport Trading and Terminal Corporation. On the contrary, the insistence was that the tariffs be changed. (R. 365, 369, 370) Representations made by the War Department are significant: "The terminal properties will be operated and controlled by the War Department. Use of the facilities by the other armed forces or by private concerns will be by the express permission of the War Department. * * * It is intended to use the terminal facilities for Government traffic only. However, circumstances may require the handling of commercial freight and in either instance the War Department or its agency will perform all services." (R. 369) "Army Base Piers No. 1 and 2 are the property of the Government and are operated by the War Department for its own exclusive use." (R. 371, 373)

For almost a year after negotiations were under way, no mention was made of anything but allowances and then, on May 1, 1943, the demand was broadened for the first time

to a request for performance of service, although qualified as a "prerequisite" to a complaint to the Commission. (R. 375) Subsequently, a similar demand without qualification followed. (R. 377) Nevertheless, when formal complaint was filed with the Commission on April 15, 1944, the Government having been in control of the property for almost two years, the allegations were limited to the failure to pay allowances. Contrary to the averment of the petition for review (R. 70) the complaint did not seek an order requiring the railroads to render service. (R. 150)

The Army never intended that the railroads should actually perform the unloading of Army freight. The evidence is clear that the Army did not desire service, that actual performance by the railroads would have been impracticable, and that it would not have been permitted by the Army subject to usual railroad standards and duties. (R. 173-178, 187, 188) The Commission so found and since its findings have substantial evidence in support thereof, there is no occasion to attempt to weigh opposing interpretations of the record.[52] Its conclusion was that "anything but operation by the complainant was impractical." (R. 90)

This is not to say that the railroads could not have rendered the service merely because of the increased volume of traffic. On the contrary, it was not the increased volume of traffic but the unusual methods adopted by the Army, entirely at variance with normal pier operations, which made service by the railroads not only impracticable from their standpoint, but undesirable to the Army. The very reasons which led the United States to take over the Army Base

[52] This type of finding, the Supreme Court has ruled, is a question of fact to be determined by the Commission and not the court. The ruling has been made in several case, cited at p. 84, *infra*, which applied the principle followed in *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, 29 (1935), see p. 83, *infra*.

proved this point,[53] as the United States would have secured railroad service in the customary manner if it had not ejected their agent from the property. Furthermore, all of the evidence recited by the Commission in support of its findings is taken from the testimony of Government witnesses.

The argument has been advanced that no change in the operation of the terminal occurred when the Army took over, that it used the personnel and equipment of the public terminal operator, and that everything proceeded as before except that the Army was in charge. The testimony of General Kilpatrick, the Commandant, reveals a far different situation. (R. 172-178, 187, 188) Furthermore, the Army required a different method of railroad delivery, having established a receiving yard where cars were placed by the railroad when and as directed, and there turned over to the Army for further disposition. (R. 275) It cannot be contended that there is any duty on a railroad, by tariff, custom or law, after delivery has been accomplished, subsequently to return to the pier to unload the freight.

The Army Base covers a large enclosure extending inland from the piers, a distance of more than two miles, to a connection with Virginian Railway tracks. (R. 273) Delivery of freight by the railroads was made to yard tracks situated near the inland entrance to the Base. Cars consigned to the Army Base were delivered only when ordered by the Army and were placed as directed on designated storage tracks. This involved splitting up the trains at the entrance to the Base and placing the cars on certain tracks as directed by the Army. (R. 275) After such placement, the cars were taken from the storage tracks and switched to the piers or warehouses without further intervention of

[53] Obviously there are compensating advantages in shipper ownership of piers, or there would not be so many private piers where the free services are not accorded. (R. 309, 511) One advantage is freedom from storage charges. (R. 306)

the railroads, and in no instance was the Belt Line requested to deliver cars directly to the piers. (R. 276)

Upon the foregoing facts, the Commission found (R. 94, 104) that its "pronouncement" in *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, 29, (1935), was applicable to this situation:

> "When a carrier is prevented from performing the service by the election of the industry to perform it, and when the service of the carrier would not meet the needs and convenience of or be satisfactory to the industry, the carrier's duty to perform the service under the line-haul rate is discharged, and there is no obligation resting upon it to make an allowance to the industry for performing the service."

The foregoing statement is pertinent to a situation where the railroads have a duty under normal circumstances to render a service, and thus it meets the contentions of the United States on its own ground. The statement would have no relevancy if, as the railroads contend, there is no obligation for which to answer. Thus, the finding means that the railroads' obligation, whatever it might have been, became discharged by final delivery of the cars on the terminal and acceptance by the Army. Thereafter the railroads had no further concern with the freight and could not have been expected to return to the terminal to unload the cars at some subsequent time.

The quoted statement of the Commission was originally made with respect to the spotting of cars on industrial sidings, but the principle involved was the same as here. The question was how much delivery service was included in the line-haul rates, and the Commission found that it varied, depending on circumstances, although the rates remained the same. Just as the United States contends now that full service was not performed, thus creating the right to an allowance, so it was contended in that proceeding that allowances were required, but the Commission held otherwise. Its pronouncement has been upheld by the Supreme

nal facility and when it demanded service from the railroads, its demand was limited to the unloading of cars. (R. 377) For obvious reasons it made no demand that the railroads provide piers to duplicate the facilities from which their agent had been ejected. Yet it would have been just as reasonable for the purpose of satisfying legal formalities to ask for substitute piers as to demand an unloading service which was not desired and which the Army did not intend to permit the railroads to perform. Nevertheless, the formal complaint seeks compensation from the railroads (one cent per hundred pounds on freight handled) for the use of the piers from which their agent was ousted. The argument is simple: Since the railroads paid their agent for the use of the piers as a railroad facility, they should pay the Government for supplying piers for its own freight.

There has never been any obligation on the railroads to provide piers. There is no such obligation under the common law and none in the Interstate Commerce Act, nor have the railroads undertaken the obligation in their tariffs. (R. 309) The tariffs of the Belt Line, which serves the Army Base, specifically disclaimed any such obligation. (R. 310) Piers are essentially station facilities of steamship companies and there is no reason why railroads should be required to provide facilities for vessels to dock.[55] The only

[55] No case will be found stating that a railroad has an obligation to provide piers for interchange of freight with vessels. The cases cited at p. 67 of Appellant's Brief on the point that a carrier has a duty to deliver safely to a connecting line are not authority for the proposition that facilities must be supplied by the initial carrier, other than connecting tracks, as in *N. Y. Central R. Co.* v. *The Talisman*, 288 U. S. 239. The two Commission cases cited on page 67 hold that railroads must provide adequate terminal facilities but it is clear that this does not mean piers, despite a passing reference to piers in the *Galveston* case, 25 I. C. C. 225, 228. In that proceeding, the Commission was dealing with adequate storage facilities, *i. e.*, tracks, warehouses or piers, for the storage of traffic moving on through export bills of lading and not with so-called interchange facilities.

obligation ever placed on the railroads by the Interstate Commerce Act is that contained in Section 6 (11) which requires a rail connection. This provision does not mean that the railroads must provide the pier or the tracks thereon, but only the connection. It is similar to Section 1(9) which requires connections to industrial sidings, but the railroad is not required to furnish the siding. *Cleveland, C.C. & St. L. Ry. v. United States*, 275 U.S. 404, 413.

In the Rivers and Harbors Act of 1919, Congress expressed the view that all ports should have public piers, publicly-owned, and in furtherance of that view, an investigation was instituted before the Commission, known as *Wharfage Charges at Atlantic and Gulf Ports*, 157 I.C.C. 663 (1929). The purpose of the proceeding was to encourage the development of publicly-owned piers by requiring the railroads to make adequate charges on railroad piers, thus eliminating all free services, such as are involved in the instant proceeding. The position taken by the Secretary of War was quite different from that of the Army in this case and the report of the Commission indicated that the railroads had neither the obligation to provide piers nor to absorb charges on the non-railroad piers. In the instant proceeding the Commission came to the same conclusion and, in addition, using the Government's own testimony, found that the railroads had not failed to provide reasonable pier facilities. (R. 93, 105)

Since the railroad facilities were more than adequate to take care of normal traffic, it seems logical and in line with constitutional principles to conclude that special facilities for war are for the Nation to provide. When the Nation requisitioned existing railroad facilities, it was hardly in a position to suggest that the railroads had failed in their duty to provide adequate facilities. Carried to its logical conclusion this argument means that the railroads could not have avoided hiring the Army under any circumstances. Had they been able immediately to provide a duplicate facility, the Army could have taken it over and demanded al-

lowances on the ground that remaining facilities were inadequate.

Since the United States now recognizes the right of the railroads to perform the service, and concedes that allowances can be required only when a duty owed has not been performed, it is interesting to speculate what was expected of the railroads with respect to wharfage after the United States seized the piers. On the theory advanced with respect to unloading, the Army should also have requested that duplicate piers be provided as a "prerequisite" to litigation, but no such formalities were indulged to support its demand for a wharfage allowance. The United States is forced to the position not only that a railroad has a primary obligation to furnish piers but also that it must subsidize a shipper who prefers to use his own pier.

In an earlier case dealing with the same facilities at Norfolk, the Commission required the publication of export rates, but not the absorption of wharfage and handling charges. *Norfolk Port Commission* v. *Chesapeake & O. Ry. Co.*, 159 I.C.C. 169 (1929). This conclusion was reached although the carrier provided such services on other piers. In an investigation styled *Interchange of Freight at Boston Piers*, 253 I.C.C. 703 (1942), the Commission again held that railroads are not obliged to pay for or maintain piers not owned by them. In a recent proceeding, decided contemporaneously with the instant litigation, the Commission found that the Government was not entitled to a wharfage allowance for supplying its own piers. The fact that the railroads had paid the terminal operator wharfage charges prior to Army occupation was held not to require allowances to the Army after its control. *Patterson* v. *Aberdeen & R.R. Co.*, 266 I.C.C. 45 (1946). The Government has not sought review of this case, brought by the Secretary of War.

D. The Commission's Conclusion That the Freight Rates Assessed Against Government Traffic Were Not Unreasonable or Discriminatory Is Supported by Substantial Evidence and Is Not Vitiated by Error of Law.

The burden of the Government's argument is, and necessarily must be in order to support an award of damages, that the Army paid unreasonable or discriminatory freight charges. Regardless of the form in which the case is presented, whether directed to the lawfulness of a practice or the right to an allowance, before damages can be awarded, there must be a finding that the Army paid the railroads excessive charges. As the Court said in *Great Northern Ry. v. Sullivan*, 294 U.S. 458, 463, "The shipper's only interest is that the charge shall be reasonable as a whole". Accordingly, the gist and substance of all the contentions of the United States come to the point that the railroads charged the Army for services not performed, that the export rates included four cents for special services, and, therefore, the rates became unreasonable or discriminatory when the service was not rendered.

The Commission found that the charges paid by the Army were not unreasonable; and since this finding is peculiarly subject to the expert judgment of the administrative tribunal, it cannot be set aside unless wholly lacking in evidential support. Although many factors are involved in the determination of reasonable rates, the principal findings of the Commission may be summarized as follows:

(a) The export rates do not of themselves cover unloading and wharfage services and were not made with consideration of such services. (R. 92, 103, 107)

(b) The export rates contain no extra compensation or increment to cover the special services. (R. 92, 105-108)

(c) The export rates to Norfolk are lower than maximum reasonable rates, being depressed to the Baltimore basis for competitive reasons. (R. 92, 105)

(d) The Army was not entitled to export rates but would have been obliged to pay the higher domestic rates except for a special concession of the railroads. (R. 91, 103)

The manner in which the export rates were made precludes the possibility of including four cents or any other specific figures for special services. The Norfolk rates are the Baltimore rates used for competitive reasons and are therefore influenced by conditions at Baltimore rather than Norfolk. The railroads perform unloading service only on their own piers at Baltimore, and despite the fact that the cost of performing the service varies from time to time, the rates are not affected thereby.

The United States offered no evidence to prove that the rates were unreasonable by the standards that the Interstate Commerce Commission ordinarily applies in its administration of the Interstate Commerce Act. Its argument depends entirely on deductive reasoning: The rates included the four cents for special services, and since the services were not rendered, the rates were unreasonable *ipso facto*. This is also the theory of the dissenting opinions whether described as "unjust enrichment" or by some other term, but its fallacy was fully demonstrated of record.[56]

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[56] Before the Commission the Government conceded that the line-haul rates were fixed without taking into account the cost of wharfage and handling services. (R. 530) Although this is not the usual method of rate-making, the situation presented in this case is by no means unique. In a case decided so recently (October 4, 1948) that it has not appeared in printed form, the Commission approved the publication of charges for unloading fruits and vegetables, a service that had hitherto been performed at certain stations without charge. Despite the long existence of free service, the Commission found that compensation for the unloading had not been included in the line-haul rates and that "the establishment of specific charges for unloading, at New York and Philadelphia, without reference to the levels of the line-haul rates is justified". *Unloading Charges, Fruits and Vegetables, New York and Philadelphia*, I. & S. Docket No. 5500.

The evidence upon which the Commission relied and which was uncontraverted by the United States is as follows: The history of the export rates shows that they contain no factor or increment to compensate for unloading or wharfage. (R. 284-285) The line-haul carriers, which make the rates, have no participation in the port services which are accorded or not, as the case may be, solely by the local lines at the port. (R. 284) In many instances export rates to the various ports are the same as the domestic rates which obviously include no such services. (R. 286) This is especially true at Baltimore and the export rates at that port provide the basis for Norfolk. Certain types of freight which the railroads do not unload take the same export rates. (R. 286) The export rates apply to freight moving over private piers, if direct delivery is made to vessel without shipper interference, although railroads do not perform the special services. (R. 455). These and other reasons support the findings of the Commission to the effect that the export rates contain no extra compensation for special services.

The evidence showing the depressed nature of the Norfolk export rates, *i.e.*, that they are lower than maximum reasonableness, will not be recited in this brief. (R. 285-287) The Court will appreciate that this is a subject with which the Commission has complete acquaintance as no problem has more consistently occupied its attention during the entire period since 1887 than the so-called port differential adjustment. It will suffice to say that of all the North Atlantic ports Norfolk has the lowest export rates on the basis of distance, comparison with prescribed domestic rates, and other relevant factors. As stated by the Commission, any further reduction by means of allowances would make the export rates that much more below reasonable limits. (R. 108)

The United States attacks this finding of the Commission on the ground that the export rates to Norfolk were at the maximum reasonable level because if the rates had been any

higher, no competitive traffic would have gone to Norfolk but would have moved to Baltimore or other competitive ports (Brief for the United States, p. 37). The United States did not address this argument to the Commission, presumably because counsel for the United States must be aware that the argument is inconsistent with the principles of rate regulation that the Commission has applied throughout its history. When customary standards of rate making, such as cost and distance, are disregarded and a rate is reduced to meet competition, it cannot be said to be at the maximum reasonable rate level; nor is a rate above a maximum reasonable level merely because it is higher than the rate charged to some competitive point. The fact is that export rates to most ports, which are competitive with Norfolk, are higher than the rates to Norfolk. The domestic rates to Norfolk are higher than the domestic rates to certain other ports which compete with Norfolk. Stated briefly, the argument of the United States is that the level of the export rates to Baltimore is the test for determining whether the export rates to Norfolk are at the maximum reasonable level. If this were true, the export rates to every other North Atlantic port would be proved unreasonable since, with the exception of Norfolk, every other port takes higher rates than Baltimore. This occurs under the port differential arrangement which has been approved many times by the Commission. The lower export rates to Norfolk have not been prescribed by the Commission, but result solely from the action of certain railroads, which serve no other port, in holding down the rate level at Norfolk to the lowest basis at any competitive port. *City of Philadelphia* v. *Baltimore & O. R. Co.*, 231 I. C. C. 21, 25-26 (1938).

With respect to the allegation of undue discrimination under Section 2, the Commission held that, "If anything, the complainant is being favored" (R. 93) and that the freight of other shippers "is not the like kind of traffic contemplated by Section 2 of the Act dealing with discrimina-

tion, and if handled in the same manner as the complainant's freight, the export rates would not apply, much less the accessorial service demanded by the complainant or an allowance therefor". (R. 105)

Little argument on this point is necessary since, as has already been shown, the railroads do not unload export freight for shippers who control their own piers and in no event pay allowances in lieu of this service. (R. 305, 316, 323, 342, 347, 351, 357) The tariffs defining the practices at the various ports contain no provision for allowances. (R. 460-484) While it is true that the Belt Line tariff referred to the payment to terminal operators at Norfolk as "an allowance", it is clear that the payment was to be made only to the agency named and that it was not an allowance in the usual sense.[57] (R. 429)

The Commission's findings on this issue are conclusive. With respect to the application of Section 2, the Supreme Court stated in *United States* v. *Wabash R. Co.*, 321 U. S. 403, 411, 413, as follows:

> "Differences in conditions may justify differences in carrier rates or service. In determining whether there is a prohibited unjust discrimination or undue preference, it is for the Commission to say whether such differences in conditions exist and whether, in view of them, the discrimination or preference is unlawful. * * * In any case findings of discrimination or undue prefer-

[57] It will be noted that the tariff quoted in the Brief for the United States, p. 72, could not be applied without reference to the tariffs of the Belt Line Railroad, whose charges were to be absorbed. Upon reference to that tariff the method to be followed in making payments was clearly indicated, *i.e.*, "to the Lincoln Tidewater Terminals, Incorporated, and/or Transport Trading and Terminal Corporation". (R. 429) It is clear under this provision to whom the payment was to be made, *i.e.*, only the terminal operator named, "as Agent", and not to the Army or any other shipper. Thus the argument that the tariffs apply to any type of traffic on a particular pier, and not to payments to a designated agent, is clearly unsound.

ence under §§ 2 and 3 (1), as we have said, are for the Commission and not the courts."

In *Barringer & Co.* v. *United States*, 319 U. S. 1, 6, which dealt with the loading of cars under certain conditions and the refusal of the railroads to load under other conditions, the Court said that the weighing of "circumstances and conditions," as required by Section 2, "is a question of fact for the Commission's determination." The opinion of the Court also makes clear that the question of discrimination is not to be isolated from other issues and decided without reference to concessions granted by the railroads which affect the total charges paid. Thus, the Commission's findings relative to the low level of the export rates and their special application to the Government have a bearing on the disposition of the issue of discrimination.

Again, it may be pointed out that the Commission's conclusions were in line with its past decisions in other similar cases and thus were not made inadvertently or with an inadequate understanding of the port rates and practices. The *Norfolk Port Commission* case, 159 I. C. C. 169 (1929), in which a carrier was required to maintain the same port rates as other railroads but not the port services, shows that the rates are not intrinsically wrong when the service is not granted, and that the line-haul rates do not necessarily include the wharfage and unloading, or what the appellant now calls the means of interchange with vessels. In the *City of Newark* case, 182 I. C. C. 51 (1932), the Commission found a violation of Section 3 in the failure to perform unloading services on railroad piers, but the prejudice was removed by "eliminating the free service" on other piers, as suggested by Commissioner Mahaffie. (See *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I. C. C. 463, 469 (1938)). The Commission declined to find a violation of Section 2, or that the service should be granted on private piers, both of which findings necessarily imply that the port rates do not of themselves include the services. The *Newark, N. J., Cham. of Com.* case, 206 I. C. C. 555 (1935) stands for the proposition that Section 2 does

not require the port services, but that the essential issue arises under Section 3 of the Act, and thus that there is no obligation to unload water-borne freight apart from preferential treatment accorded competitive shippers. In the *Weyerhaeuser* case, where the complaining terminal operator was found to be a public wharfinger, and thus qualified to claim the benefit of Section 3, under the established practices of the railroads, no case was found under Sections 1 and 2 for the same reasons mentioned above.

CONCLUSION.

For the reasons that have been stated in this brief the judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: February 1949

APPENDIX.

I. The relevant provisions of the Judicial Code, as amended by the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208, 28 U. S. C. 41 (28), 43-48) are as follows:[1]

§41. (Judicial Code, section 24.) Original jurisdiction.

The district courts shall have original jurisdiction as follows:

* * * * * * * *

(28) Setting aside order of Interstate Commerce Commission.

Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

§43. Venue of suits relating to orders of Interstate Commerce Commission.

The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

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[1] The provisions of the Urgent Deficiencies Act have been incorporated into Title 28 of the United States Code by Public Law 773, 80th Congress, approved June 25, 1948 (see 28 U. S. C. §§ 1253, 1336, 2101, 2284, 2321-2325).

§44. Procedure in certain cases under interstate commerce laws; service of processes of court.

The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 47, 47a, and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43, and 49 of Title 49, run, be served, and be returnable anywhere in the United States.

§45. (Judicial Code, section 209.) District courts; practice and procedure in certain cases.

The jurisdiction of the district courts of the cases specified in section 44 of this title, and of the cases and proceedings under sections 20, 43, and 49 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action

or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court.

§45a. (Judicial Code, sections 212, 213.) Special attorneys; participation by Interstate Commerce Commission; intervention.

The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43, and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided fur-*

ther, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

§46. (Judicial Code, section 208.) Suits to enjoin orders of Interstate Commerce Commission to be against United States.

Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

§47. Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking.

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States,

or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set

aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

§47a. (Judicial Code, section 210.) Appeal to Supreme Court from final decree; time for taking; priority.

A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that Court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court.

§48. (Judicial Code, section 211.) Suits to be against United States; intervention by United States.

All cases and proceedings specified in section 44 of this title shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved.

II. The relevant provisions of Part I of the Interstate Commerce Act, as amended, are Sections 1(5)(a), 1(6), 2,

6(8), 8, 9, 13(1), 15(13), 16(1), and 17(9). These sections are found in Title 49 of the United States Code:

§1: Regulation in general; car service; alteration of line.

(5) Just and reasonable charges required; classification of messages, and rates; exchange of services.

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

(6) Classification of property for transportation; regulations and practices.

It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

§2. Special rates and rebates prohibited.

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

§6. Schedules and statements of rates, etc., joint rail and water transportation.

(8) Preference to shipments for United States. In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

§8. Liability in damages to persons injured by violation of law.

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a rea-

sonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

§9. Remedies of persons damaged; election; witnesses.

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

§13. Complaints to and investigations by Commission.

(1) Complaint to Commission of violation of law by carrier; reparation; investigation.

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which

shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(13). Allowance for service of facilities furnished by shipper.

If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

§16. Orders of Commission and enforcement thereof; forfeitures.

(1) Orders by Commission for payment of damages.

If, after hearing on a complaint made as provided in section 13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

§17. Commission procedure; delegation of duties; rehearings.

(9) Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

